

VANDERBILT UNIVERSITY LAW SCHOOL  
PUBLIC LAW AND LEGAL THEORY  
RESEARCH PAPER SERIES

Research Paper Number 01-01  
2001



NANCY J. KING  
SUSAN R. KLEIN

Federal Sentencing Reporter  
Vol. 13, July-Aug. 2000

This paper can be downloaded without charge from the  
Social Science Research Network electronic library at:  
[http://papers.ssrn.com/abstract\\_id=244748](http://papers.ssrn.com/abstract_id=244748)

## **Après Apprendi**

by Nancy J. King<sup>(1)</sup> & Susan R. Klein<sup>(2)</sup>

### ***Outline***

#### **I. Introduction**

#### **II. Federal Defendants**

##### **A. Raising *Apprendi* on Direct Appeal**

###### **1. Properly Preserved Claims - Harmless Error**

###### ***(a) Upholding Original Sentence for Higher Offense - Harmlessness under Neder***

*(i) Failure to Instruct Trial Jury or Prove Beyond Reasonable Doubt*

*(ii) Failure to Include Element in Indictment*

*(iii) Misunderstanding of Elements of Crime at Plea Proceeding*

###### ***(b) Upholding Original Sentence for Higher Offense - Other Theories of Harmlessness***

*(i) Prior Offender Status.*

*(ii) Consecutive Sentences.*

###### ***(c) Upholding Original Sentence as Valid for Lesser Offense - Futility of Resentencing as Harmless***

###### **2. Untimely Claim on Appeal - Plain Error**

##### **B. *Apprendi*-related Claims and 28 U.S.C. § 2255**

###### **1. Retroactivity and *Teague***

***(a) Apprendi as New Rule***

***(b) The Bousley Loophole***

###### **2. Successive Motions Under §2255**

###### **3. Late Filings - *Apprendi* Error and the One-Year Limitations Period**

###### **4. Procedurally Defaulted Claims Under § 2255**

## C. Claims of Ineffective Assistance

### III. State Prisoners

#### A. Direct Appeal

#### B. Collateral Relief for State Prisoners

#### C. Remedy

### IV. Conclusion

#### I. Introduction

After *Apprendi v. New Jersey*,<sup>(3)</sup> any fact, other than a prior conviction, that increases the penalty for an offense beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. This due process rule is bound to change the course of criminal litigation significantly, both in the near future and well into the coming decades. In another article<sup>(4)</sup> we attempt to answer some of the profound questions raised by the *Apprendi* case including constitutional oversight of legislative authority to define what is a "crime," questions that will ripen as legislatures look for ways around the rule and litigants test these legislative reactions. In this shorter essay, we focus on a more immediate problem facing those laboring in the trenches of the criminal justice system: the correction of flawed judgments after *Apprendi*.

*Apprendi* threatens thousands of completed criminal prosecutions under dozens of existing federal and state statutes. Appendices A and B collect many of these provisions. Some are what we would call "add-on" statutes resembling the hate crime law at issue in *Apprendi*. Such "add-on" statutes impose a higher maximum sentence for any offense (or for a large subset of crimes) following proof at sentencing of a specified aggravating fact. Statutes that add prison time to what would otherwise be a statutory maximum if a firearm was used, or if there was injury to a victim, or if the crime was committed while on pretrial release, are examples of "add-on" statutes that are subject to the *Apprendi* rule. Also at risk are convictions and sentences under what we would call "nested" statutes. "Nested" statutes are those that include provisions that define a core offense, but peg higher sentence ceilings to the presence of aggravating facts as determined by the sentencing judge. The carjacking provision examined by the Court in *Jones v. United States*<sup>(5)</sup> and the firearms offense interpreted in *United States v. Castillo*<sup>(6)</sup> are examples of such "nested" statutes, as are theft statutes that set the sentence maximum using the sentencing judge's determination of the value of property stolen, and drug statutes that boost maximum sentences for increasing quantities of drugs.

Whether relief is available to those sentenced under these statutes depends in part upon whether the *Apprendi* claim was raised on direct appeal or in a petition for collateral relief; whether the failure to treat a sentencing fact as an element was raised as a challenge to the indictment, to jury instructions at trial, to the validity of a guilty plea, or even as a claim of ineffective assistance; whether the claim was properly preserved by the defense; and whether the defendant's sentence would have been identical had he been convicted of the un-aggravated offense. These different contexts are considered separately, for federal and state defendants, in the analysis that follows.

## II. Federal Defendants

A large percentage of federal prisoners today are serving sentences for violating 21 U.S.C. § 841, prohibiting the distribution of controlled substances.<sup>(7)</sup> Judgments in these cases are now open to challenge under *Apprendi* because for years courts assumed that although § 841(b) tied maximum sentences to the amount of drugs involved, drug amount was a sentencing factor that did not need to be included in the indictment or proven to a jury beyond a reasonable doubt. The Supreme Court has already remanded dozens and dozens of cases for reconsideration in light of *Apprendi*,<sup>(8)</sup> most of them federal drug cases, and the number of lower court decisions evaluating the post-*Apprendi* claims of federal drug defendants increases weekly. For prosecutors defending these sentences, we predict much litigation and some resentencing, but relatively few released defendants.

## A. Raising *Apprendi* on Direct Appeal

Defendants who challenge their sentence under *Apprendi* on direct appeal will encounter two major road blocks: harmless error and plain error.

### 1. Properly Preserved Claims - Harmless Error

#### (a) Upholding Original Sentence for Higher Offense - Harmlessness under *Neder*

(i) Failure to Instruct Trial Jury or Prove Beyond Reasonable Doubt. Consider first the defendant convicted by a jury of violating § 841, who alleges only the denial of a jury determination of drug amount. Assume further that this defendant raised his *Apprendi* claim in time by demanding, albeit unsuccessfully, that drug quantity be proven to the jury beyond a reasonable doubt. Conveniently, just before it announced its decision in *Jones*, the Court held in *Neder v. United States* that omitting an element of an offense from trial jury instructions can be harmless error.<sup>(9)</sup> *Neder* involved the failure of the trial court to instruct the jury on the element of "materiality" in a tax fraud charge. Five justices decided that the evidence of this element was "overwhelming" and "uncontested," and therefore the omission of this element in the charge to the jury was harmless beyond a reasonable doubt.<sup>(10)</sup> Justice Stevens concurred, but concluded that the error was harmless because the jury's verdict "necessarily included a finding" that the element existed.<sup>(11)</sup> Based on the assumption that none of the five justices in the *Neder* majority will shift their votes in the future and join Justice Stevens' more confined standard,<sup>(12)</sup> it is inevitable that some defendants denied due process under *Apprendi* will find their route to relief blocked by the harmless error doctrine embraced in *Neder*. Our federal drug offender, for example, is out of luck if the record shows that "overwhelming" proof of drug type and amount was introduced at trial, and was not contested at the time.<sup>(13)</sup>

(ii) Failure to Include Aggravating Element in Indictment. The defendant sentenced under § 841(b) whose indictment fails to allege drug amount or type is in an even better position to obtain relief. Unlike the trial context where the omission of an element from jury instructions may be harmless, the omission of an element from a federal indictment is considered to be a constitutional violation not subject to a finding of harmless error.<sup>(14)</sup> If *Apprendi* means that maximum-boosting facts must be included as elements in the indictment as well as proven to a jury, prosecutors may be unable to use harmless error to fend off an attack upon a judgment under a higher offense whenever the indictment fails to allege the requisite drug amount. The Court in *Apprendi* did not decide whether the Grand Jury Clause of the Fifth Amendment requires maximum-enhancing facts to be included as elements in the indictment. Justice Stevens, noting that the issue had not been raised, carefully declined to discuss whether the grand jury indictment as well as the trial jury instructions must include maximum enhancing facts as elements.<sup>(15)</sup>

However, given the Court's earlier dicta in *Jones* that it does, [\(16\)](#) and the historical link between the *Apprendi* rule and pleading practices, [\(17\)](#) the Court's affirmative answer to its open question seems to be a foregone conclusion. Consequently, under prevailing doctrine, unless a prosecutor succeeds in invoking one of the other theories of harmlessness detailed below, *Apprendi* error affecting the indictment may warrant relief from a conviction under the higher, insufficiently alleged offense, even if the government later proved the omitted element at trial, even if the defendant admitted the omitted element at a plea proceeding, [\(18\)](#) and, it seems, even if the defendant expressly waived his right to challenge his conviction or sentence. [\(19\)](#)

(ii) *Misunderstanding of Elements of Crime at Plea Proceeding.* *Apprendi* also provides ammunition for defendants who have been convicted following a guilty plea. Like the defendant in *Bousley v. United States*, [\(20\)](#) who attacked his plea-based conviction after the Supreme Court in *Bailey v. United States* [\(21\)](#) unexpectedly decided that Bailey's firearm offense required proof of active employment of the firearm, a defendant convicted of violating § 841 may be able to claim after *Apprendi* that at the time he pleaded guilty, "neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged." [\(22\)](#) The defendant must show he was actually misled by the court as to the elements of his offense. If he does, he may be entitled to relief even if the prosecutor is able to show that properly informed, the defendant would have pleaded guilty to the aggravated offense anyway. [\(23\)](#) Plea-based judgments challenged under *Apprendi*, while not falling within *Neder*, nevertheless have been upheld under one or more of the theories of harmlessness detailed below.

### **(b) Upholding Original Sentence for Higher Offense - Other Theories of Harmlessness.**

(i) *Prior Offender Status.* Courts have experimented with two other rationales for saving sentences that exceed that statutory maximum sentence allowable for the validly proven lesser offense. First, some courts have suggested that an otherwise unconstitutionally steep sentence can be salvaged by substituting the enhancement that would have been added to the underlying sentence had the defendant been sentenced as a prior offender. [\(24\)](#) 21 U.S.C. § 841(b)(C), for example, authorizes raising the statutory maximum sentence for any amount of schedule I or II substances from 20 to 30 years if the defendant has a prior felony drug conviction. And, under *Almendarez-Torres*, sentences may be enhanced by a judge beyond the statutory maximum based upon the fact of prior convictions, without charging those convictions in the indictment or submitting them to a jury for a finding beyond a reasonable doubt. We think that a sentence invalid after *Apprendi* should be cured only if the government had filed the necessary information *before trial* concerning the defendant's prior conviction. [\(25\)](#)

(ii) *Consecutive sentences.* Second, panels from the Fourth, Sixth, Eighth, and Eleventh Circuits have all reasoned that because the trial judge *could have* imposed consecutive rather than concurrent sentences, there was no "plain error." [\(26\)](#) The Court itself in *Apprendi* rejected this avenue, [\(27\)](#) however, a point the Tenth Circuit recognized in refusing to uphold a sentence on this basis. [\(28\)](#)

### **(c) Upholding Original Sentence as Valid for Lesser Offense - Futility of Resentencing as Harmlessness**

Should an offender succeed in proving that his sentence for the aggravated offense is tainted by *Apprendi* error, which is not harmless under the theories above, the defendant may be entitled to resentencing on the lesser offense, each element of which *was* alleged and proven in accordance with the Constitution. [\(29\)](#) Sometimes a significant sentence reduction will be warranted. [\(30\)](#) For example, in the unlikely event

that drug *type* as well as amount is missing from an indictment, then the court upon resentencing an offender convicted under § 841 must assume that the offense of conviction involved the minimal amount of that controlled substance punished least severely -- marijuana. Thus, the statutory maximum would drop to one year under § 841 (b)(4), the only offense validly pled and proven.<sup>(31)</sup>

Courts are disposing of many of these cases with yet another harmless error analysis. Prosecutors may preserve original sentences by demonstrating that even if error might have tainted the higher offense, so long as the defendant's conviction for the lesser offense is sound, and so long as the sentence on that lesser offense would have been the same, any *Apprendi* error is harmless. Because the sentence ceilings of even the un-aggravated provisions of § 841 are so high, and because consideration of higher drug amounts than that proven by plea or trial is still permissible in setting a sentence within those ceilings, sentencing under the lesser offense will not reduce time behind bars.<sup>(32)</sup> Perhaps because of the volume of *Apprendi* challenges in drug cases, judges have now condensed this reasoning to the following short cut: If a defendant received a sentence that was actually within the non-enhanced limits of the lesser offense, the *Apprendi* error is harmless.<sup>(33)</sup> There is no need to delve into the merits of the error itself, once a court determines that the Guidelines would have produced the exact same sentence for the lesser offense.

The case of *United States v. Aguayo-Delgado*<sup>(34)</sup> will illustrate. The defendant, prior to *Apprendi*, was convicted of conspiracy to distribute methamphetamine in violation of § 846. At sentencing the judge determined that the defendant had distributed over 3 but less than 15 kilograms of methamphetamine, which mandated a base offense level of 36 under the Sentencing Guidelines. The combination of his base offense level and criminal history category yielded a sentencing range of 235 - 293 months.<sup>(35)</sup> The judge imposed a sentence of 240 months. Following *Apprendi*, the defendant appealed his conviction and sentence, and demonstrated that his indictment failed to include an allegation of the *amount* of methamphetamine. The Circuit court affirmed the sentence, because the trial judge on resentencing would have had to use the exact same Guidelines calculations, and reach the same result. It is true that after *Apprendi* the judge cannot sentence above the statutory maximum for the highest offense alleged in the indictment and found by the jury. For *Aguayo-Delgado* was up to 30 years under 21 § 841(b)(1)(C) for delivery of *any* amount of methamphetamine (rather than life imprisonment, the sentence maximum provided by § 841(b)(1)(A) for 50 grams or more of methamphetamine). However, the 240-month sentence originally imposed did not exceed that 30 year cap. *Aguayo-Delgado* might argue that a different calculation under the Guidelines should apply on resentencing, one using offense level 12 (for any amount of methamphetamine), which would produce a recommended range of 10-16 months.<sup>(36)</sup> But nothing in *Apprendi* changes the government's ability to relitigate at sentencing facts not proven beyond a reasonable doubt at trial. Even facts expressly rejected by a trial jury may be proven at sentencing by a preponderance, and used by the judge to set a sentence, even a mandatory minimum sentence, so long as that sentence is *within the statutory maximum*.<sup>(37)</sup>

Indeed, as some courts have observed, there may be no *Apprendi* error at all if the defendant was properly convicted of the lesser offense and his sentence was set in accordance with the Guidelines and within the maximum sentence ceiling for that offense.<sup>(38)</sup>

## 2. Untimely Claim on Appeal - Plain Error

Consider now the federal drug offender whose indictment is sufficient, who objects on appeal to the lack of jury finding on the element of drug amount, but who did not raise this objection at trial. Under FRCrP

52, an appellant who fails to raise his claim on time can only obtain relief if he can demonstrate that his judgment was infected with "plain error." This barrier to relief was extended recently by the Court in *Johnson v. United States* to the omission of an element from jury instructions at trial.<sup>(39)</sup> Defendants who are late in raising their *Apprendi* claim will receive no relief unless they can demonstrate an "effect on substantial rights" and a "miscarriage of justice" - no easy task, judging from early returns.<sup>(40)</sup> Some defendants nevertheless are able to obtain relief under plain error standards, with significant sentence reductions.<sup>(41)</sup>

Again, resentencing should be more accessible for the defendant who demonstrates that his indictment omitted the element that aggravated the offense. For just as the failure to allege an essential element of an offense had, at least before *Apprendi*, not been considered harmless when a defendant raises the issue properly before trial, a defendant's belated claim after conviction that his indictment failed to allege an essential element was also exempt from the usual plain error rules.<sup>(42)</sup> Recent decisions, however, show a different trend. The pressure to extend more rigorous harmless error and plain error review to missing-allegation cases has produced in some lower-court opinions repeated expressions of frustration with the rule of automatic reversal for missing elements. Already some courts are finding that the failure to allege an element of a higher offense does not amount to plain error if the defendant stipulated to the aggravating fact triggering the higher offense,<sup>(43)</sup> or if the reviewing court is convinced "beyond a reasonable doubt" that a grand jury would have returned an indictment including such amounts if requested,<sup>(44)</sup> or that with a properly worded indictment, a properly instructed jury would have convicted.<sup>(45)</sup> Indeed, there is some possibility that *Apprendi* will prompt both the Court and Congress to reconsider their respective automatic reversal rules for missing elements in a federal indictment, especially in light of several decisions undermining the grand jury's screening function.<sup>(46)</sup> Since its decision to apply harmless error analysis to constitutional error in *Chapman v. California*,<sup>(47)</sup> the Court has yet to revisit directly the application of harmless error or plain error review to the failure to allege an essential element in a federal indictment, nor has the Court considered the question in light of its recent decisions in *Neder* or *Johnson* extending harmless and plain error review to the omission of an element from trial jury instructions.

As with properly preserved claims of *Apprendi* error, see A.1(c) above, many courts have avoided confronting the automatic reversal rules for missing elements by upholding a sentence as valid for a properly alleged lesser offense.

## **B. *Apprendi*-related Claims and 28 U.S.C. § 2255**

Federal defendants who have completed their direct appeals must seek relief for *Apprendi* error through 28 U.S.C. § 2255. Most federal convictions and sentences that fall under *Apprendi*'s shadow will be sheltered by the rules limiting collateral relief.

### **1. Retroactivity and *Teague***

**(a) *Apprendi* as New Rule.** One formidable barrier to relief for *Apprendi* error under § 2255 is *Teague v. Lane*,<sup>(48)</sup> which bars retroactive application of "new rules" of procedure unless the rule meets one of two

narrow exceptions. That *Apprendi* is a "new" rule under *Teague*, not "dictated" by prior precedent, is amply illustrated by the debate between the justices about its consistency with prior decisions. We believe the majority in *Apprendi* is correct, and that the decision is quite consistent with prior precedent, (49) but one would be hard pressed to maintain that "no other interpretation was reasonable." (50)

As for the *Teague* exceptions, the *Apprendi* rule does not qualify as a rule that protects certain conduct from punishment altogether. (51) Nor, in our view, does it qualify for the second exception as a watershed ruling central to an accurate determination of guilt that "alter[s] our understanding of the bedrock procedural elements essential to the fairness of the proceeding." (52) However this is a closer question. On the one hand the rule is fundamental in that it affects potentially any criminal statute, involves the basic mechanisms of adjudication (burden of proof and the jury), and affects the accuracy of individual judgments. On the other hand, the rule of *Apprendi* lacks the "primacy and centrality of the rule adopted in *Gideon*," (53) for unlike deprivations of counsel, it does not protect the blameless from punishment, but instead protects the unquestionably blameworthy from unauthorized amounts of punishment. The failure to submit one element of a charge to a jury has already been submitted to plain error and harmless error review - it is not structural error like the complete denial of counsel. Arguably, *Apprendi* does no more to "alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding" than other rules rejected under the exception, including the ruling in *Batson v. Kentucky*. Indeed, the Court has yet to find any ruling that qualifies for this exception, and it seems unlikely to us that the *Apprendi* rule will be the first. (54)

It is possible that the resolution of this issue may be influenced by the pending decision in *Tyler v. Cain*, concerning the retroactivity of the new rule in *Cage v. Louisiana*. (55) In *Cage* the court held that a jury instruction equating the reasonable doubt standard with "moral certainty" unconstitutionally diluted the reasonable doubt standard, and at least one court of appeals, the Fourth Circuit, has held that *Cage* fits within the second *Teague* exception. That same court of appeals, however, would distinguish *Apprendi* from *Cage*, and has refused to apply *Apprendi* retroactively, stating that while the error in *Cage* affected the entire case, *Apprendi* error affects only one element. (56)

(b) *The Bousley Loophole*. The Court in *Bousely v. United States* (57) held that where an applicant for relief under § 2255 seeks retroactive application of a new interpretation of substantive criminal law, rather than a new rule of procedure, he need not worry about retroactivity and *Teague*. Just as the petitioner in *Bousley* was not barred by *Teague* from taking advantage of a new interpretation of the weapons offense of which he was convicted, defendants convicted of aggravated carjacking after *Jones* or of the possession of particular weapons after *Castillo* may seek retroactive application of the Court's recent interpretations of these federal offenses. (58) Conceivably, by pointing to the first decision from his neighborhood court of appeals finding as a matter of statutory interpretation that the sentence-enhancing fact in any given federal criminal statute is an element, an applicant previously sentenced under that statute who seeks relief under § 2255 may, like *Bousley*, cast his claim as one that seeks to apply a new interpretation of substantive criminal law rather than one seeking retroactive application of the procedural rule announced in *Apprendi*.

## 2. Successive Motions Under §2255

Applicants who raise their *Apprendi* claims in a second or successive § 2255 motion will encounter a dead end. Relief for such claims is available only if the court of appeals will certify that the claim is based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme

Court that was previously unavailable." [\(59\)](#) But no court of appeals can make such a certification unless and until the United States Supreme Court decides that *Apprendi* should be applied retroactively, a decision we believe is unlikely to materialize. [\(60\)](#)

Moreover, a defendant whose second or successive petition raises *Jones* or *Castillo*, both of which were decided on statutory, not constitutional, grounds, [\(61\)](#) must give up on § 2255. The review of claims in second or successive § 2255 motions is restricted to claims based upon new rules of constitutional law; there is no provision for the review of claims based on new interpretations of federal statutes. Defendants raising these claims may resort instead to bringing a petition under 28 U.S.C. § 2241 and argue that the remedy under § 2255 is inadequate or ineffective, as have other defendants who ran into the same problem when they belatedly sought § 2255 relief claiming they were not guilty of "use" of a firearm after the Court attributed a new meaning to that offense in *Bailey*. [\(62\)](#)

### ● Late Filings - *Apprendi* Error and the One-Year Limitations Period

A similar problem arises if a defendant's first attempt to seek relief from *Apprendi* error under § 2255 is filed more than a year following the date on which the original judgment became final. An exception to the new one-year limitations period provides that the period will not begin to run until the "date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review . . . ." One of the more curious drafting anomalies of the AEDPA, this language differs slightly from the language governing successive petitions, which requires that the new rule be "made retroactive to cases on collateral review *by* the Supreme Court . . ." (emphasis added). Relying on this difference in wording, one district judge has concluded that because at least one other federal district court had decided that *Apprendi* applies retroactively, the decision had been "made retroactively applicable" within the terms of the statute, so that a defendant's 2255 motion would not be time barred. [\(63\)](#) Others disagree and construe the both provisions to require that the Supreme Court itself apply a decision retroactively before a claim under that decision can be considered despite the late filing. [\(64\)](#)

This question is superfluous, of course, for those courts that would deny retroactive application of *Apprendi* even for timely filed claims. Additionally, other significant barriers to relief remain.

### 4. Procedurally Defaulted Claims Under § 2255

Even if not blocked by rules barring claims that are late or raised in second or successive motions, or by retroactivity doctrine generally, § 2255 applicants who did not raise their claims early enough must demonstrate cause for and prejudice from their failure to protest on time, or, alternatively, their actual innocence. [\(65\)](#) Here again, courts will turn to *Bousley* for guidance, where the Court rejected the defendant's argument that the novelty of the claim endorsed by the Court in its *Bailey* decision provided "cause" for his default. The Court concluded that the legal basis for Bousley's claim *was* reasonably available at the time (noting "the Federal Reporters were replete with cases involving" similar claims), so that novelty as cause was unavailable. [\(66\)](#) Nor did the Court accept the defendant's argument that raising the claim earlier would have been futile: "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time." [\(67\)](#) Similar conclusions concerning "cause" can be expected in the context of *Apprendi* challenges to convictions and sentences under § 841.

[\(68\)](#)

Indeed, a panel of the Seventh Circuit has concluded that "the foundation for *Apprendi* was laid long before 1992. Other defendants had been making *Apprendi*-like arguments ever since the Sentencing Guidelines came into being, and in *McMillan*, the Court addressed on the merits an argument along similar lines." [\(69\)](#)

That leaves our offender who has the defaulted claim with only the alternative of showing actual innocence. For a violator of § 841, this means showing that the more serious drug amount or type that should have been proven beyond a reasonable doubt to a jury probably did not exist. [\(70\)](#) Further, if the conviction is the result of a plea bargain, as Bousely's was, the defendant must show in addition, that he is innocent of any more serious charge which had been dismissed as part of his plea bargain. For many federal prisoners, either showing will raise insurmountable burdens. [\(71\)](#)

### C. Claims of Ineffective Assistance

Rather than raise an *Apprendi*-related claim directly, a defendant may allege that his attorney should have done so at trial or on direct appeal. Making out the required showing of "prejudice" will be the most common obstacle here, [\(72\)](#) just as harmless error and actual innocence standards will derail many of the claims of *Apprendi* error described above. Moreover, a defendant convicted of violating § 841 will not have an easy time establishing that his attorney's conduct in failing to anticipate *Apprendi* "fell below an objective standard of reasonableness." [\(73\)](#) Before *Apprendi*, not a single Circuit had agreed to characterize drug amount as an element under § 841 rather than a sentencing factor, even after the Court's decision in *Jones*. [\(74\)](#)

## III. State Prisoners

State statutes triggering *Apprendi* issues abound; a sampling is included in Appendix B. Not included in the appendix are statutes that provide for consecutive sentences only upon certain factual findings. These statutes have so far produced a number of conflicting opinions, with some courts finding that such a scheme requires those facts authorizing consecutive sentences to be found by a jury beyond a reasonable doubt, and others rejecting that position. [\(75\)](#)

### A. Direct Appeal

State offenders who raise *Apprendi* as a basis for attacking their sentences and convictions face similar hurdles, for most of them will encounter rules for harmless and plain error on direct appeal that are very like those in the federal system. [\(76\)](#) However, some states offer more generous review for an aggrieved prisoner, having rejected *Neder* and/or *Johnson*, [\(77\)](#) while other states extend even less relief for delinquent claims than is provided by federal law. In particular, the Grand Jury Clause does not bind the states, and the failure to allege an essential element in the charge is not a fatal error in many states. [\(78\)](#) Nevertheless, some states consider the failure to allege an essential element in the charge a "jurisdictional error" that, like the failure to plead an essential element in a federal indictment, can be raised at any time. [\(79\)](#)

### B. Collateral Relief for State Prisoners

State post-conviction relief may be available for *Apprendi* error, but state courts, too, may limit collateral

relief in ways similar to limits in federal court. A number have, for example, rejected retroactive application of *Apprendi*, relying on *Teague*.<sup>(80)</sup> Others have applied *Apprendi*'s principles retroactively.<sup>(81)</sup> Significantly, however, the 1996 amendments to the federal habeas statute effectively block federal habeas corpus relief for state prisoners who seek relief from the rejection by state courts of *Apprendi*-like arguments made prior to the date *Apprendi* was handed down.<sup>(82)</sup> These prisoners will not be able to show that a state court's failure to treat a maximum-enhancer as an element was "contrary to. . . clearly established Federal law, as determined by the Supreme Court of the United States,"<sup>(83)</sup> because *Apprendi* was a case of first impression for the Court.<sup>(84)</sup> Nor would a state prisoner be able to demonstrate that a state court's failure to anticipate *Apprendi* was an "unreasonable application" of prior precedent, even after *Jones*, given that four dissenting justices in *Apprendi* thought prior precedent compelled a different rule.<sup>(85)</sup> At least one court of appeals has granted habeas relief for the failure to prove to a jury an enhancing element by relying not on *Apprendi* but on *Winship*, *Mullaney*, and *McMillan*. In any event, state court decisions made after *Apprendi* was handed down that fail to heed its commands in resolving what must be treated as an element will be subject to collateral review in federal court.

### C. Remedy

As in the federal system, state prisoners who do succeed in mounting a challenge based on *Apprendi* will probably obtain at most resentencing rather than dismissal and retrial.<sup>(86)</sup> As the sentence ceilings provided by the states for lesser drug offenses tend not to be as high as those for federal drug offenses, resentencing may in some cases produce a sentence much lower than the original sentence.<sup>(87)</sup>

### IV. Conclusion

A considerable quantity of criminal justice resources will be spent sorting out the proper punishment for state and federal prisoners who were convicted by the time the Court announced its decision in *Apprendi*. Eventually, however, the number of pre-*Apprendi* convictions will dwindle to a trickle and this correction process will have run its course. The more lasting impact of the decision, we believe, will be its effect on legislative efforts to draft offense definitions and sentencing statutes in its wake, and on its implications for constitutional limits on the shape of substantive criminal law.

## Appendix A

### Selected Federal Statutes Subject to *Apprendi* Challenge

<b>Statute</b>	<b>Maximum enhancing feature(s) Discussed In:</b>
----------------	---

7 U.S.C. § 2024(b) (food stamp fraud)	Increasing maximum sentence from one to five years if value exceeds \$100, and from five to twenty years if value exceeds \$1,000.	<i>United States v. Garcia</i> , 240 F.3d 180 (2d Cir. 2001)
8 U.S.C. § 1324(a)(1)(B) (alien smuggling)	Increasing maximum sentence from five years to the death penalty if smuggling was for commercial advantage or gain, if serious bodily injury is caused, or if the violation results in the death of any person.	<i>United States v. Hernandez-Guardado</i> , 228 F.3d 101 (9th Cir. 2001)
18 U.S.C. § 13 (drunk driving on military base or federal lands)	Increasing maximum sentence by one year where minor in vehicle.	
18 U.S.C. § 34 (penalty when death results)	Increasing maximum sentence to death penalty based upon crime resulting in death.	<i>Ferranti v. United States</i> , 2001 WL 273827 (2d Cir. 2001) (unpublished)
18 U.S.C. § 43(b) (aggravated offense, animal enterprise terrorism)	Increasing maximum sentence from one year to life imprisonment based upon finding of bodily injury or death.	
18 U.S.C. § 111(a)(2) (assaulting federal officer)	Increasing maximum sentence from one to three years based upon seriousness of assault.	<i>United States v. McCulligan</i> , 2000 U.S. Dist. LEXIS 16013 (E.D.Pa., Nov. 30, 2000); <i>United States v. Nuñez</i> , 180 F.3d 227 (5th Cir. 1999)
18 U.S.C. § 111(b) (use of a weapon in assault of federal officer)	Increasing maximum sentence from three to ten years based upon use of a deadly weapon or infliction of bodily injury.	<i>United States v. Chestaro</i> , 197 F.3d 600 (2d Cir. 1999)
18 U.S.C. § 201(b)(2) (bribery)	Increasing fine to three times the monetary equivalent of the thing of value.	
18 U.S.C. § 215 (bribery of a bank officer)	Increasing maximum sentence from one to thirty years if value exceeds \$1,000.	
18 U.S.C. § 216 (penalty and injunctions)	Increasing maximum sentence from one to five years if violation of 18 U.S.C. §§ 203-205 or §§ 207-209 (bribery and gratuity) occurs willfully.	

18 U.S.C. § 241, 242 (civil rights violations)	increasing maximum sentence from ten years to life if violation causes death of victim; increasing maximum from one year to ten with bodily injury	<i>United States v. Velazquez</i> , 246 F.3d 204 (2d Cir. 2001)
18 U.S.C. § 247 (damage to religious property)	Increasing maximum sentence from one year to death penalty based upon finding of bodily injury or death.	<i>Jones v. United States</i> , 1998 WL 713483 (1999) (oral argument)
18 U.S.C. § 248(b) (penalties for violation of freedom of access to clinic entrances act)	Increasing maximum sentence from three to ten years or life imprisonment based upon serious bodily injury or death.	
18 U.S.C. § 510 (forgery)	Increasing maximum penalty from one to ten years if value exceeds \$1,000.	
18 U.S.C. § 521 (criminal street gang statute)	Increasing maximum sentence by additional ten years if federal felony offense was committed while participating in or to promote a criminal street gang.	<i>United States v. Matthews</i> , 178 F.3d 295 (5th Cir.), <i>cert. denied</i> , 528 U.S. 944 (1999)
18 U.S.C. § 653 (misuse of public funds)	Increasing fine to amount embezzled.	
18 U.S.C. § 659 (interstate or foreign shipments by carrier)	Decreasing maximum sentence from ten years to one year based upon value of goods stolen not exceeding \$10,000.	<i>United States v. Galvez</i> , 2000 WL 1140343 (S.D. Fla. 2000)
18 U.S.C. § 661 (theft within special maritime jurisdiction)	Increasing maximum sentence from one to five years based upon value of property.	
18 U.S.C. § 893 (extortionate extensions of credit)	Increasing fine to twice the value of the money or property so advanced.	
18 U.S.C. § 924(c) (use of firearm in relation to crime of violence or drug trafficking)	Increasing maximum sentence by additional five to thirty years based upon type and use of firearm.	<i>Castillo v. United States</i> , 530 U.S. 120 (2000) (Congress intended the statutory references to particular firearm types to define separate crimes)
18 U.S.C. § 924(c)(1)(A) (enhanced penalties for use of weapon in relation to crime of violence or drug trafficking)	Increasing maximum sentence by an additional five to ten years based upon brandishing or discharging weapon; increasing maximum sentence to life based on type of firearm.	<i>United States v. Harris</i> , 2001 WL 273146 (4th Cir. 2001); <i>United States v. Sandoval</i> , 241 F.3d 549 (7th Cir. 2000); <i>United States v. Carlson</i> , 2000 WL 924593 (8th Cir. 2000); <i>United States v. Pounds</i> , 230 F.3d 131 (11th Cir. 2000)

<p>18 U.S.C. § 924(e)(1) (Armed Career Criminal Act of 1984)</p> <p>18 U.S.C. § 924(j) (causing death of a person in the course of a violation of subsection (c))</p> <p>18 U.S.C. § 982 (criminal forfeitures)</p> <p>18 U.S.C. § 1030(c) (penalty for fraud in connection with computers)</p> <p>18 U.S.C. § 1033 (crimes by or affecting persons engaged in the business of insurance)</p> <p>18 U.S.C. § 1091(b) (punishment for genocide)</p> <p>18 U.S.C. § 1201 (death during kidnapping)</p> <p>18 U.S.C. §§ 1341 and 1343 (mail and wire fraud)</p> <p>18 U.S.C. § 1347 (health care fraud)</p>	<p>Providing a mandatory minimum of fifteen years and no specified maximum sentence for violating 922(g) after three previous convictions.</p> <p>Increasing maximum sentence by additional five years to death sentence based upon a murder.</p> <p>Authorizing property forfeiture in addition to maximum penalty for violation of money laundering or bank secrecy act based on offense involving property or generating proceeds.</p> <p>Increasing maximum sentence from one to five years based upon value of information.</p> <p>Increasing maximum sentence from ten to fifteen years based upon jeopardizing the soundness of an insurer.</p> <p>Increasing maximum sentence from twenty years to death penalty based upon resulting death.</p> <p>Increasing maximum sentence from life imprisonment to death penalty based upon death of victim.</p> <p>Increasing maximum sentence from five to thirty years based upon violation affecting a financial institution.</p> <p>Increasing maximum penalty from five years to death penalty based upon whether bodily injury or death.</p>	<p><i>United States v. Thomas</i>, 2001 WL 178506 (11th Cir. 2001); <i>United States v. Mack</i>, 2000 WL 1456245 (3d Cir. 2000)</p> <p><i>United States v. Peña-Gonzalez</i>, 62 F. Supp. 2d 366 (D. P.R. 1999)</p> <p></p> <p></p> <p></p> <p></p> <p></p> <p><i>United States v. Montgomery</i>, 2001 WL 132210 (10th Cir. 2001) (unpublished); <i>Hernandez v. United States</i>, 226 F.3d 839 (7th Cir. 2000); <i>United States v. Brown</i>, 1999 WL 1068273 (D. Me. 1999)</p> <p></p> <p><i>United States v. Ellis</i>, 2001 U.S. App. LEXIS 2234 (9th Cir., Feb. 15, 2001); <i>United States v. Nachamie</i>, 2001 WL 266349 (2d Cir. 2001) (unpublished)</p>
--	--	---

18 U.S.C. § 1363 (buildings or property within special maritime jurisdiction)	Increasing maximum sentence from five to twenty years based upon the building being a dwelling or a life being placed in jeopardy.	<i>United States v. Davis</i> , 202 F.3d 212 (4th Cir. 2000)
18 U.S.C. § 1503(b) (punishment for influencing juror)	Increasing maximum penalty from ten years to death penalty based upon killing.	<i>United States v. Russell</i> , 234 F.3d 404 (8th Cir. 2000)
18 U.S.C. § 1512(a) (witness tampering)	Increasing maximum penalty from twenty years to death based upon death of witness.	
18 U.S.C. § 1791(b) (federal inmates possessing prohibited object)	Increasing maximum sentence from six months to twenty years based upon nature of prohibited object.	<i>United States v. Allen</i> , 190 F.3d 1208 (11th Cir. 1999)
18 U.S.C. § 1958(a) (use of interstate commerce in commission of murder-for-hire)	Increasing maximum penalty from ten years to life imprisonment if death results.	<i>United States v. Tinsley</i> , 238 F.3d 418 (4th Cir. 2000) (unpublished); <i>United States v. Smith</i> , 232 F.3d 651 (8th Cir. 2000)
18 U.S.C. § 1959 (violent crime in aid of racketeering activities)	Increasing maximum penalty from three years to death penalty based upon use of weapon, injury to victim, death of victim.	<i>United States v. Kee</i> , 2000 WL 863119 (S.D.N.Y. 2000)
18 U.S.C. § 1963(a)(3) (criminal RICO forfeiture)	Mandating forfeiture of proceeds derived from or proceeds of racketeering activity.	<i>United States v. Corrado</i> , 227 F.3d 543 (6th Cir. 2000); <i>United States v. Corrado</i> , 227 F.3d 528 (6th Cir. 2000)
18 U.S.C. § 2113(b) (bank theft)	Increasing maximum sentence from one to ten years if value exceeds \$1,000.	
18 U.S.C. §§ 2113(d) and (e) (bank robbery)	Increasing maximum penalty from twenty years to death if person is assaulted or killed.	
18 U.S.C. §§ 2261(A) (interstate stalking) and 2261 (interstate domestic violence)	Increasing maximum sentence from five years to life based on injury to victim.	<i>United States v. Brown</i> , 1999 WL 1068273 (D. Me. 1999)
18 U.S.C. § 2262(b) (penalties for interstate violation of protective order)	Increase sentence from five to ten years if serious bodily injury to the victims result, twenty years if permanent disfigurement results, or life imprisonment if the victim dies.	

18 U.S.C. § 2326 (enhanced penalties for fraud)	Increasing maximum fraud sentence by additional five years based upon telemarketing, and additional ten years based upon victimizing at least ten persons over age fifty-five.	<i>United States v. Pavelcik</i> , 232 F.3d 898 (9th Cir. 2000) (unpublished)
18 U.S.C. § 2332(b)(c) (penalties for acts of terrorism transcending national boundaries)	Increasing maximum sentence from ten to twenty-five years based on damage to property, thirty years based on serious bodily injury, thirty-five years for maiming, life imprisonment for kidnapping, and the death sentence for killing.	<i>United States v. Nichols</i> , 2001 WL 208713 (D. Colo. 2001); <i>United States v. Bin Laden</i> , 126 F. Supp. 2d 290 (S.D.N.Y. 2001)
18 U.S.C. § 2701(b) (punishment for violation of video piracy protection act)	Increasing sentence from six months to one year based upon purpose of commercial advantage.	
18 U.S.C. § 3147 (penalty for offense committed while on release)	Increasing maximum sentence by additional one to ten years for commission of an offense while on release.	<i>United States v. Ellis</i> , 2000 WL 33173123 (9th Cir. 2001); <i>United States v. Parolin</i> , 239 F.3d 922 (7th Cir. 2001); <i>United States v. Davis</i> , 114 F.3d 400 (2d Cir. 1997)
18 U.S.C. § 3559(c)(3)(A) (federal three-strikes law)	Increasing maximum sentence for a serious violent felony to mandatory life imprisonment based upon recidivism, with exceptions for certain kinds of robberies.	<i>United States v. Gatewood</i> , 230 F.3d 186 (6th Cir. 2001) (en banc); <i>United States v. Williams</i> , 230 F.3d 1368 (Table) (9th Cir. 2000); <i>United States v. Kaluna</i> , 192 F.3d 1188 (9th Cir. 1999)
21 U.S.C. § 841(b) (penalties for marijuana possession)	Decreasing maximum sentence from five years to one year based upon small amount and no remuneration.	<i>United States v. Lowe</i> , 2000 WL 1768673 (S.D. W.Va. 2000)
21 U.S.C. §§ 841(b)(1)(A), (B) and (C) (manufacture or possession of a controlled substance with intent to distribute)	Increasing maximum sentence from twenty years to life based upon quantity of Schedule I or II substance or injury/death.	<i>United States v. Fields</i> , 2001 WL 241804 (D.C. Cir. 2001); <i>United States v. Brough</i> , 2001 WL 278479 (7th Cir. 2001); <i>United States v. Cambrelen</i> , 2001 WL 219285 (2d Cir. 2001); <i>United States v. Smith</i> , 240 F.3d 927 (11th Cir. 2001); <i>United States v. Rebmann</i> , 226 F.3d 521 (6th Cir. 2000)

21 U.S.C. § 841(b)(1)(D) (manufacture or possession of a controlled substance with intent to distribute)	Increasing maximum sentence from one to five years based upon quantity of marijuana.	<i>United States v. Keeling</i> , 235 F.3d 533 (10th Cir. 2000); <i>United States v. Kelly</i> , 2000 WL 103972 (S.D. Cal. 2000)
21 U.S.C. § 841(b)(7) (penalties for distribution)	Increasing maximum sentence from one to twenty years based upon commission of crime of violence during drug offense.	
21 U.S.C. § 843(d) (penalties for prohibited acts)	Increasing maximum sentence from four to ten years based upon intent to manufacture methamphetamine.	<i>United States v. Caldwell</i> , 238 F.3d 424 (6th Cir. 2000) (unpublished)
21 U.S.C. § 844(a) (penalties for simple possession)	Increasing maximum sentence from one to twenty years based upon the substance containing cocaine base, from one year to three years based upon possession of flunitrazepan.	
21 U.S.C. § 846 (attempt and conspiracy to distribute controlled substances)	Authorizing same enhancements as under 21 U.S.C. § 841(b).	<i>United States v. Porter</i> , 1999 WL 1116812 (10th Cir. 1999); <i>United States v. Aguayo-Delgado</i> , 2000 WL 988128 (8th Cir. 2000)
21 U.S.C. § 848(e) (death penalty for violation of continuing criminal enterprise)	Increasing maximum sentence from life imprisonment to death penalty based upon an intentional killing.	
21 U.S.C. § 853 (criminal forfeitures)	Authorizing property forfeiture in addition to maximum sentence based on property being used in or derived from a drug offense.	
21 U.S.C. § 859 (distribution to persons under age 21)	Authorizing twice the maximum sentence for violation of § 841(b), based upon distribution to a person under twenty-one years of age.	
21 U.S.C. § 860 (distribution near schools)	Authorizing twice the maximum sentence available for violation of § 841(b) based upon distributing within 1,000 feet of a school.	<i>United States v. Edmonds</i> , 240 F.3d 33 (D.C. Cir. 2001)
21 U.S.C. §§ 952(a) and 960(a)(1) (importing controlled substance)	Increasing maximum sentence from five years to life based on type and quantity of controlled substance.	<i>United States v. Ayala-Moreno</i> , 2001 WL 231694 (9th Cir. 2001) (unpublished); <i>United States v. Martinez</i> , 232 F.3d 728 (9th Cir. 2000)

31 U.S.C. §§ 5322(b),  
5324(c) (criminal penalties  
for violation of bank secrecy  
act)                      Increasing maximum sentence  
from five to ten years based upon  
violating the bank secrecy act  
while violating another law or as  
part of a pattern of illegal  
activity.

## **Appendix B**

### Selected State Criminal Statutes Subject to *Apprendi* Challenge

#### *Examples of "Nested" Statutes That Allow Judge to Raise the Penalty Within a Certain Type of Crime*

#### 1. Theft Statutes

<b>State and Statute</b>	<b>Maximum Enhancing Feature</b>	<b>Discussed In:</b>
Ga. Code Ann. § 16-8-12 (Georgia) (1933)	Increasing offense from misdemeanor to ten-year felony if theft exceeded \$500; to fifteen-year sentence if defendant is fiduciary or public employee.	<i>State v. Forthe</i> , 514 S.E.2d 890 (Ga. Ct. App. 1999); <i>Hight v. State</i> , 472 S.E.2d 113 (Ga. Ct. App. 1996)
Md. Ann. Code art. 27 §342 (Maryland) (1977)	Increasing offense from misdemeanor to fifteen- year felony if theft exceeded \$300.	<i>State v. Stackowitz</i> , 511 A.2d 1105 (Md. 1986); <i>Proctor v. State</i> , 435 A.2d 484 (Md. 1981)

#### 2. Controlled Substance Statutes

**State and Statute**

Ala. Code Ann. § 13-A-12-250; § 13A-12-270

**Maximum Enhancing Feature**

Adding five years if sale within three miles of school.

**Discussed In:**

*Sanders v. State*, 2001 Ala. Crim. App. LEXIS 33 (Ala. Crim. App. March 2, 2001); *Pearson v. State*, 2001 Ala. Crim. App. LEXIS 19 (Ala. Crim. App. March 2, 2001)

Ga. Code Ann. § 16-13-31 (Georgia) (1989)

Increasing sentence from ten to twenty-five years based upon quantity.

*Cleveland v. State*, 463 S.E.2d 36 (Ga. Ct. App. 1995)

N.D. Cent. Code § 19-03.1-23.1 (North Dakota) (1989)

Raises offense to next higher class of felony based upon quantity.

*State v. Allesi*, 216 N.W.2d 805 (N.D. 1974)

*Examples of "Add-on" Statutes That Allow Judge to Raise the Penalty for all Crimes*

1. "While on Release" Statutes

**State and Statute**

D.C. Code Ann. § 23-1328 (D.C.) (1970)

**Maximum Enhancing Feature**

Additional one to five years if felony, ninety to 180 days if misdemeanor.

**Discussed In:**

*Speight v. United States*, 569 A.2d 124 (D.C. 1989) (en banc)

Ariz. Rev. Stat. § 13-604.02(A) (Arizona) (1993)

Court may increase statutory maximum by up to 25% if it finds two "substantial aggravating factors."

*State v. Hurley*, 741 P.2d 257 (Ariz. 1987); *State v. Powers*, 742 P.2d 792 (Ariz. 1987)

Conn. Gen. Stat. § 53a-40b (Connecticut) (1990)

Adds ten years to offense if felony, adds one year if misdemeanor.

*State v. Sanko*, 62 Conn. App. 34 (Conn. App. Ct. 2000)

N.H. Rev. Stat. Ann. § 597:14-b (New Hampshire) (1988)

Adds up to seven years to sentence if felony offense, one year if misdemeanor.

*State v. Ringuette*, 697 A.2d 507 (N.H. 1997)

R.I. Gen. Laws § 12-13-1.2 (Rhode Island) (1985)

Additional two to ten years if felony, ninety to 365 days if misdemeanor.

## 2. Firearms Statutes

State and Statute	Maximum Enhancing Feature	Interpreted In:
Cal. Penal Code §§ 12022 et. al. (California) (1977)	Additional one to ten years for felony if weapon used.	
GSA § 53-202k	Additional term of five years if firearm used	<i>State v. Montgomery</i> , 254 Conn. 694, 759 A.2d 995 (2000); <i>State v. Price</i> , 61 Conn. App. 417 (Conn. App. 2001)
Ind. Code § 35-42-1-3 (Indiana) (1987)	Raises voluntary manslaughter to higher class of felony.	
LSA-R.S. 14:64:3 (Louisiana)	Additional term of five years if firearm used for armed robbery	<i>State v. Walker</i> , 2001 WL 579870 (5/10/01 La. App.)
Ky. Rev. Stat. Ann. § 218A.992 (Kentucky) (1994)	Controlled substance offenses raised to higher class of felony.	<i>Adams v. Commonwealth</i> , 931 S.W.2d 465 (Ky. Ct. App. 1996)
Me. Rev. Stat. Ann. tit. 17-A § 401 (Maine) (1977)	Burglary offenses raised to higher class of felony.	<i>State v. DeWalt</i> , 684 A.2d 1291 (Me. 1996)
N.D.C.C. § 12.1-32-09	Additional five year term if firearm used	<i>Clark v. State</i> , 621 N.W.2d 576 (N.D. 2001)
N.J. Stat. Ann. § 2C39-4.1 (New Jersey) (1998)	Controlled substance offenses raised.	
NY Penal Law § 265.09(2)	additional term of five years with display of loaded weapon from which a shot discharged	<i>People v. Rhodes</i> , 723 N.Y.S. 2d 2 (NY Sup. Ct. 2001)
N.C. Gen. Stat. § 15A-1340.16A	Adding sixty-month enhancement.	<i>State v. Guice</i> , 541 S.E.2d 467 (N.C. App. 2000), <i>stay granted</i> , 2001 N.C. LEXIS 136 (N.C. Jan. 18, 2001)

## Endnotes

1. <sup>1</sup> Professor of Law and Associate Dean for Research and Faculty Development, Vanderbilt University Law School. E-mail: [nancy.king@law.vanderbilt.edu](mailto:nancy.king@law.vanderbilt.edu).

2. <sup>2</sup> Baker & Botts Professor of Law, University of Texas at Austin. E-mail:

sklein@mail.law.utexas.edu. We thank Michael Churgin, Jerold Israel, Douglas Laycock, Jordan Steiker, and George Thomas. We appreciate the research assistance of Nancy Pridgen, Daniel Riess and Anthony Spaeth. Please contact the authors directly for an updated version.

3. <sup>3</sup>. 120 S.Ct. 2348 (2000).

4. <sup>4</sup>. Nancy J. King and Susan R. Klein, *Essential Elements*, 54 Vanderbilt Law Rev. \_\_\_\_ (forthcoming 2001).

5. <sup>5</sup>. 526 U.S. 227 (1999).

6. <sup>6</sup>. 530 U.S. \_\_\_\_ (2000). Congress has amended this statute to provide statutory minimums, with no statutory maximum. Most Circuits have held that under this new statute, the aggravator need not be submitted to the jury. *See, e.g., United States v. Harris*, 2001 WL 273146 (4th Cir. 2001); *United States v. Carlson*, 217 F.3d 986, 987 (8th Cir. 2000).

7. <sup>7</sup>. Overall, 58.9% of the total federal prison population in 1998 were incarcerated for drug-related offenses. USDOJ, Sourcebook of Criminal Justice Statistics, 1998. The average sentence for a federal drug offender in 1990 was 84 months. United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (February 1995), p. 138 and nn.186-188. Altogether, some 400,000 federal, state, and local inmates - almost a quarter of the overall inmate population - are serving time or awaiting trial for drug offenses. Justice on Trial 23, Leadership Conference on Civil Rights and Education Fund, 2000, [http://www.civilrights.org/policy\\_and\\_legislation/pl\\_issues/criminal\\_justice/](http://www.civilrights.org/policy_and_legislation/pl_issues/criminal_justice/); Allen J. Beck, Bureau of Justice Statistics Bulletin 1, USDOJ, Office of Justice Programs, April 2000, NCJ 181643, <http://www.ojp.usdoj.gov/bjs/> (discussing inmate population).

8. <sup>8</sup>. *See Carless Jones v. United States*, No. 99-8176, 6/29/00, *certiorari granted, judgment vacated*, and *case remanded* in light of *Apprendi v. New Jersey*; *Wims v. United States*, No. 99-8958, 10/2/00 (11th Cir., Table of Decision Without Reported Opinion) (conviction for 21 U.S.C. § 841); *Burton v. United States*, No. 99-9902, 10/2/00 (5th Cir., affirmance without opinion) (convictions for 21 U.S.C. §§ 841(a)(1), 846); *Gibson v. United States*, No. 99-7351, 10/2/00, *op. below* 187 F.3d 631 (4th Cir. 1999) (convictions for 21 U.S.C. § 846 and 18 U.S.C. § 922(g)(1)); *Brown v. United States*, No. 99-9107, 10/10/00 (11th Cir., Table of Decision without Reported Opinion) (convictions for 21 U.S.C. § 841); *Clinton v. United States*, 121 S.Ct. 296, 10/10/00; *op. below* 210 F.3d 285 (5th Cir. 2000) (convictions for 21 U.S.C. §§ 841(a)(1), 846); *Smith v. United States*, No. 00-5198, 10/16/00, *op. below* 215 F.3d 1331 (7th Cir. 2000) (unpublished) (conviction for 21 U.S.C. § 841); *Hester v. United States*, No. 99-10024, 10/16/00, *op. below* 199 F.3d 1287 (11th Cir. 2000) (convictions for 21 U.S.C. § 841(b)(1)(A)(vii)); *Curry v. United States*, No. 99-10265, 10/30/00 (11th Cir. 2000) (indictment did not list drug quantities); *Jackson v. United States*, No. 99-10055, 10/30/00, *op. below* 207 F.3d 910 (7th Cir. 2000) (conviction for 21 U.S.C. § 841); *Whitt v. United States*, No. 00-183, 11/6/00, *op. below* 211 F.3d 1022 (7th Cir. 2000) (convictions for 21 U.S.C. §§ 841, 846); *Twitty v. United States*, No. 00-5760, 2000 WL 1210720 (4th Cir. 11/27/00); *Robinson v. United States*, No. 00-287, 11/27/00, 2000 WL 1210736, *op. below* 76 F.Supp.2d 941 (N.D. Ill. 1999) (21 U.S.C. § 841); *Potts v. United States*, No. 00-5930 (11th Cir. 11/27/00), 2000 WL 1280377; *Meais v. United States*, No. 00-5942 (4th Cir. 11/27/00), 2000 WL 1280571; *Knight v. United States*, 2000 WL 1199070 (3d Cir. 11/13/00); *Humphrey v. United States*, 2000 WL 1199070 (11/13/00), *op. below* 210 F.3d 373 (6th Cir. 2000) (21 U.S.C. § 846); *Valensia v. United States*, 121 S.Ct. 1222 (3/5/01), *op. below* 222 F.3d 1173 (9th Cir. 2001); *Ravelo v. United States*,

No. 00-965, 4/2/01 (11th Cir. 2001); *Ford v. United States*, 121 S.Ct. 1598 (2001), op. below, 228 F.3d 417 (11th Cir. 2000); *Collazo-Aponte v. United States*, 2001 WL 530830 (May 21, 2001), op below 216 F.3d 163 (1st Cir. 2000).

9. <sup>9</sup>. See *Neder v. United States*, 527 U.S. 1, 12-15 (1999).

10. <sup>10</sup>. 527 U.S. at \_\_\_ ("where an omitted element is supported by uncontroverted evidence, this approach reaches an appropriate balance between 'society's interest in punishing the guilty [and] the method by which decisions of guilt are made' ").

11. <sup>11</sup>. See *Neder*, 527 U.S. at 27 (Stevens, J., concurring). Justice Scalia, joined by Justices Souter and Ginsburg, dissented, arguing that the Court's decision meant that the remedy for the constitutional violation is a repetition of the same violation by a different judge. 527 U.S. at 30-40.

12. <sup>12</sup>. There is reason to believe this shift might occur. The five-justice majority in *Apprendi* defending the importance of jury review of each and every element consisted of the three dissenters in *Neder* plus Justices Thomas and Stevens. When the harmlessness of *Apprendi* error eventually reaches the Court, Justice Thomas may renounce his decision in *Neder* and conclude either that such error is never harmless, or that Justice Steven's position is more consistent with *Apprendi*. (Recall that in *Apprendi* he renounced his vote in *Almendarez-Torres*).

13. <sup>13</sup>. For cases finding harmless error under *Neder* for jury instructions omitting elements, see, e.g., *United States v. Anderson*, 236 F.3d 427 (8th Cir. 2001) (applying *Neder* and finding that amount necessary to justify actual sentence was "supported by overwhelming evidence" making it "improbable that any rational jury could conclude" that the defendant's object was to produce fewer than 5 grams of methamphetamine); *United States v. Sheppard*, 219 F.3d 766 (8th Cir. 2000) (failure to instruct jury that drug quantity is an element of 21 U.S.C. § 841 was harmless because the indictment charged the defendant with conspiracy to distribute more than 500 grams of methamphetamine, and the jury made a special finding of that quantity); *United States v. Green*, 246 F.3d 433 (5th Cir. 2001) (at trial "there was extensive detailed and uncontroverted testimony regarding the scope of the allged conspiracy and the quantities of drugs); *People v. Marshall*, 99 Cal. Rptr.2d 441 (Cal.App. 2 Dist. 2000) (failure to instruct the jury that the firearm must have proximately caused the death and the decedent, before imposing additional 25-year sentencing enhancement, was harmless beyond a reasonable doubt as defendant repeatedly shot decedent who was supine upon the ground); *Sustache-Rivera v. United States*, 221 F.3d 8 (1st Cir. 2000) (failure to submit issue of serious bodily injury during carjacking, pursuant to 18 U.S.C. § 2119(2), was harmless error, as jury heard uncontroverted evidence that the defendant shot his victim, and that his victim ultimately lost a limb); *United States v. Davis*, 202 F.3d 212, 217 (4th Cir. 2000) (holding that failure to instruct jury on the aggravating facts of "destructive conduct directed at a dwelling" and "placing lives in danger," was harmless when those facts were "uncontested and supported by overwhelming evidence"). See also *People v. Martinez*, 2001 Colo. App. LEXIS 678 (April 12, 2001) ("the conduct enhancing the felony class of defendant's convictions - serious bodily injury and sexual assault - was necessarily proven beyond a reasonable doubt because the jury was given instructions on each of the crimes that included the sentence enhancing conduct"); *People v. Geisendorfer*, 991 P.2d 308, 312 (Colo. Ct. App. 1999) (finding that failure to instruct jury that fear of serious bodily harm experienced by the victims must be "imminent" was harmless when no reasonable jury could have determined that the victims' fear was of anything other than imminent serious bodily harm).

*Compare United States v. Brown*, 202 F.3d 691, 703 (4th Cir. 2000) (failure to instruct jury regarding separate element under *Richardson* not harmless when defendant "genuinely contested" evidence); *Keating v. Hood*, 191 F.3d 1053, 1065 (9th Cir. 1999) (instructions omitting the element of *mens rea*, and thus allowing defendant to be convicted of securities fraud as either a direct perpetrator or an aider and abettor, not harmless); *People v. Peoples*, No. 98CA2486, 2000 Colo. App. LEXIS 838, at \*4 (Colo. App. 2000) (omitting from jury instructions element that dwelling was that of "another" in a trespass case was not harmless when defendant contested missing element "vigorously" at trial and presented conflicting witness testimony); *People v. Sparks*, 2001 Cal. App. LEXIS 331 (May 3, 2001) (defective instruction not harmless).

14. <sup>14</sup>. See, e.g., *Hamling v. United States*, 418 U.S. 87 (1974); *Russell v. United States*, 369 U.S. 749 (1962). See also LaFave, Israel & King, 4 Criminal Procedure at § 19.2(d) and (e) and § 19.3(a) (West, 2d ed., 1999). We do not believe that this analysis would change had the prosecutor filed a bill of particulars. But see *United States v. Braugh*, 204 F.3d 177 (5th Cir. 2000) (indictment that omits essential element of offense sufficient under Fifth Amendment's Grand Jury Clause because it alleged facts from which grand jury could have inferred missing element, relying on *Neder*), *petition for cert. filed 6/20/00*, *Brauch v. United States*, 99-2049.

15. <sup>15</sup>. *Apprendi*, 120 S.Ct. at 2355-56, n.3.

16. <sup>16</sup>. 526 U.S. at 243, n. 6 ("under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be *charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt") (emphasis added).

17. <sup>17</sup>. In addition to the extensive historical review in the concurring opinion of Justice Thomas in *Apprendi*, see King & Klein, *supra* note 4 (reviewing historical background).

18. <sup>18</sup>. That a defendant admitted the existence of a missing element as part of a guilty plea, or that a trial jury concluded the fact existed after a fair trial is "irrelevant." *United States v. Du Bo*, 186 F.3d 1177, 1180 n.3 (9th Cir. 1999) (vacating conviction when *mens rea* omitted from indictment). See, e.g., *United States v. Keith*, 605 F.2d 462 (9th Cir. 1979) (relief despite proof at trial); *United States v. Cabrera Teran*, 168 F.3d 141 (5th Cir. 1999) (relief despite plea); *United States v. Prentiss*, 206 F.3d 960, 977 (10th Cir. 2000) (vacating conviction of charge of arson when indictment failed to allege elements of Indian status of defendant and victim, despite guilty verdict by jury, defense stipulation to missing elements, and failure of defendant to contest existence of elements, noting that "applying harmless error analysis to the total omission of an essential element would allow the prosecution to circumvent the grand jury proceeding" and collecting similar cases); *United States v. Spinner*, 180 F.3d 514, 516 (3d Cir. 1999) (finding that failure to allege element of "interstate commerce" in indictment was "fatal" and thus vacating conviction, following guilty plea).

Lower courts have applied the automatic reversal rule for insufficient indictments in several carjacking cases post-*Jones*. See, e.g., *United States v. Rudisill*, No. 99-4588, 2000 U.S. App. LEXIS 10380, at \*\*3-4 (4th Cir. May 15, 2000) (vacating guilty plea because indictment failed to allege element of "serious bodily injury," noting that it is "error for the district court to sentence a defendant where an indictment fails to allege an essential element of the offense and the district court fails to include the element when advising the defendant of the elements of the crime with which he is charged"); *United*

*States v. Arnett*, 1999 U.S. App. LEXIS 27415 (6th Cir. 1999) (concluding that because "the serious bodily injury element of § 2119(2) was not included in the indictment and was not presented to the jury . . . we must vacate Arnett's sentence for carjacking under § 2119(2) and remand . . . for resentencing under § 2119 (1)"); *United States v. Matthews*, 178 F.3d 295 ( 5th Cir. 1999) (same); *United States v. Davis*, 184 F.3d 366 (4th Cir. 1999) (same).

19. <sup>19</sup>. The waiver of appellate rights as part of a plea or sentence agreement is increasingly popular in the federal system, and has proved to be a powerful weapon for prosecutors. See Nancy J. King, *Priceless Process*, 47 UCLA L. Rev. 1 (1999) (discussing appeal waivers). But several courts have held that even an express waiver does not prohibit a defendant from appealing a sentence imposed in excess of the statutory maximum for the crime of conviction. See, e.g., *United States v. Candelario*, 2001 WL 94607 (11<sup>th</sup> Cir., Feb. 5, 2001). At least one court has allowed defendants to raise *Jones* error on appeal, despite an express waiver of the right to appeal. See *United States v. Rudisill*, 2000 U.S. App. LEXIS 10380 (4th Cir. May 15 2000) (finding that defendant's waiver of appeal did not prevent him from challenging his carjacking sentence under *Jones* on appeal). See also *United States v. Pease*, 2001 WL 79886 (11<sup>th</sup> Cir, Jan. 30 , 2001) (assuming without deciding that an appeal waiver reserving right to appeal sentence imposed above maximum statutory maximum did not bar *Apprendi* claim). But see *United States v. Aguilera*, 2001 WL 301079 (8th Cir. 2001) (unpublished) (waiver of right to appeal in plea agreement bars attack on sentence above the statutory maximum); *Latorre v. United States*, 193 F.2d 1035 (8th Cir. 1999) (questioning validity of collateral attack waivers in dicta).

20. <sup>20</sup>. 523 U.S. 614 (1998).

21. <sup>21</sup>. 516 U.S. 137 (1995).

22. <sup>22</sup>. 523 U.S. at 618-19.

23. <sup>23</sup>. *Id.* But see *United States v. Rebmann*, 226 F.3d 521 (6th Cir. 2000) (where defendant pleaded guilty to heroin distribution understanding that if the court found that death resulted from the distribution she could be sentenced to a life term rather than the statutory maximum of 20 years, court vacated 292 month sentence based upon a judicial finding by a preponderance of the evidence and remanded for court determination of this element beyond a reasonable doubt).

24. <sup>24</sup> See also *United States v. Hicks*, 2000 WL 1872701 (8<sup>th</sup> Cir. 2000) (unpublished) (remanding for determination of whether prior conviction would cure sentence of thirty years).

25. <sup>25</sup> See *United States v. Poulack*, 2001 WL 15734 (8<sup>th</sup> Cir., Jan. 9, 2001) (dicta, finding no plain error because the defendant stipulated to the amount of marijuana that would authorize his sentence, after learning that the amount could increase his sentence). However, a prosecutor who adds a recidivism enhancement after defendant successfully appeals his sentence may face a claim of prosecutorial vindictiveness. See *North Carolina v. Pearce*, 395 U.S. 711 (1969) (trial judge's imposition of higher sentence after defendant's appeal and reconviction raises question of vindictiveness).

26. <sup>26</sup> See *United States v. Sturgis*, 2001 WL 9604 (8<sup>th</sup> Cir., 2001) ("Because defendant's sentence could be reformed to avoid an *Apprendi* error, we perceive no plain error in his sentence."); *United States v. White*, 2001 WL 7453 (4<sup>th</sup> Cir. Feb. 1, 2001) (Under USSG 5G1.2(d), the trial court "would have been obligated to reach that total sentence . . . by ordering those terms to be served consecutively to achieve

the total punishment mandated by the Guidelines."); *United States v. Page*, 232 F.3d 536 (6<sup>th</sup> Cir. 2000) (declining to notice unpreserved *Apprendi* error where defendants in any event would have been jailed for the same period through the imposition of consecutive sentences), *cert. denied*, 121 S.Ct. 1389 (2001). *See also United States v. Smith*, 2001 WL 79882 (11<sup>th</sup> Cir. Jan. 30, 2001) (finding no plain error although sentenced above statutory maximum for validly proven offense, noting that together the three convictions subjected defendant to a total of sixty years in prison, and concluding that "when the ultimate sentence does not exceed *the aggregate statutory maximum for multiple convictions*" there is no effect on substantial rights) (emphasis added); *Rivera v. United States*, 2001 WL 303759 (S.D.N.Y. 2001) (saving sentence over statutory maximum by stacking consecutive counts).

27. *See Apprendi* at \_\_\_\_ (noting "the relevant inquiry is the constitutionality of the sentence imposed on each individual count charged irrespective of the potential total sentence achievable through the imposition of valid consecutive sentences.").

28. *See United States v. Jones*, 235 F.3d 1231 (10<sup>th</sup> Cir. 2000) (noting "We will not permit our result to be guided by idle speculation as to the sentence that might be imposed by the district court on remand.").

29. <sup>29</sup>. Retrial on the more aggravated offense will be impractical in many cases, and, in any event, may be barred by double jeopardy. Your coauthors disagree with each other about the probable resolution of this double jeopardy issue. One believes that once a defendant has been tried on a nested offense, and succeeds in raising an *Apprendi* challenge to his enhanced sentence, he may not be retried on the higher offense on remand, because the jury convicted him of the lesser offense, and by attacking his sentence he does not seek to vacate this conviction. *See Brown v. Ohio*, 432 U.S. 161 (1977) (conviction on lesser offense of joyriding bars trial on greater offense of auto theft). *See United States v.*

*Arrendondeo-Hernandez*, 246 F.3d 676 (9<sup>th</sup> Cir. 2000) (unpublished) ("We reject the government's argument that it should have the option of electing for a new trial or accepting a resentencing of [defendant] to the lesser term . . . The *Apprendi* error affected [defendant's] sentence, not his conviction."); *see also* Daniel C. Vock, Sentencing Law Now Bears Ryan's Stamp, *Chicago Law Bulletin*, Feb. 26, 2001, at 1 (noting that defense attorneys are challenging as a violation of double jeopardy, a provision that allows an appellate court to order a new trial when a jury was never charged to prove that the defendant qualified for enhanced sentences). The other maintains that retrial on the higher offense may be permissible, because the error is essentially an error in jury instructions which does not bar retrial after a successful appeal.

For cases ordering resentencing, *see, e.g.*, cases collected in note \_\_ *supra*; and notes \_\_\_\_ *infra*. *See also United States v. Brown*, 202 F.3d 691, 703-04 (4<sup>th</sup> Cir. 2000) (*Richardson* error not harmless, vacating CCE conviction and sentence, but affirming conviction and sentence for other charges); *United States v. Mack*, 301 F.3d 1312, 1312-13 (11<sup>th</sup> Cir. 2000) (vacating Continuing Criminal Enterprise conviction for *Richardson* error, but remanding for sentencing on conviction of lesser offense). Two Circuits have vacated a sentence under *Apprendi* and offered the district court the choice of retrying the defendant on the vacated count or resentencing at the lower statutory drug amount. *United States v. Velasco-Heredia*, 2001 U.S.App. LEXIS 8732 (9<sup>th</sup> Cir., May 10, 2001) ("we afford the government the option of (1) accepting a resentencing to a lesser term . . . or (2) providing [defendant] a new trial on the issue of quantity"); *United States v. Von Meshack*, 225 F.3d 556 n.20 (5<sup>th</sup> Cir. 2000); *United States v. Lewis*, 2000 WL 1390065 (4<sup>th</sup> Cir. 2000) (unpublished); *United States v. McWaine*, 2001 WL 30615 (5<sup>th</sup> Cir., Jan. 12,

2001) (remanding for retrial on higher count or resentencing on lower count, at the discretion of the trial court).

30. <sup>30</sup>. See, for example, *United States v. Murphy*, 109 F.Supp.2d 1059 (D. Minn. 2000) (reducing a defendant's sentence from 300 to 240 months based upon *Apprendi* error); *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000) (vacating 10 year sentence and remanding for sentence not to exceed five years' imprisonment). See also *United States v. Murray*, 2001 WL 118605 (6<sup>th</sup> Cir. 2001) (recalling mandate because 25 year sentence exceeded the 20 year max authorized by offense for lower amount, no jury instruction given at trial on higher amount); *United States v. Lines*, 2001 WL 329546 (4th Cir. 2001) (unpublished) (sentence reduced from life imprisonment to 40 years); *United States v. Westmoreland*, 240 F.3d 618 (7th Cir. 2001) (sentence reduced from life to 40 years); *United States v. Noble*, 2001 WL 357328 (7th Cir. 2001) (sentence remanded for a reduction from 360 months to no more than 20 years); *United States v. Thomas*, 2001 WL 290046 (5th Cir. 2001) (defendant Weekly's sentence remanded for reduction from life imprisonment to no more than 20 years); *United States v. Yakle*, 2001 WL 25719 (8th Cir. 1/11/01) (sentence reduced by 22 months); *United States v. Mauleon*, 2001 WL 263092 (9th Cir. 2001) (unpublished) (reducing sentence from 120 months to 5 years); *United States v. Fields*, 242 F.3d 393 (D.C. Cir. 2001) (reducing sentence from life plus 120 years to no more than 30 years); *United States v. Vigneau*, 2001 WL 273094 (1st Cir. 2001) (reducing sentence "well in excess of that maximum" to 5 years); *United States v. Von Meshack*, 2000 WL 1218437 (5th Cir. 2000) (two life sentences vacated where statutory maximum was 30 years); *United States v. Lewis*, 2000 WL 1390065 (4th Cir. 2000) (unpublished) (121 months sentence exceeded statutory maximum of 5 years); *United States v. Arredondo-Hernandez*, 2000 WL 1861229 (9<sup>th</sup> Cir. 2000) (unpublished) (sentence reduced from life imprisonment to twenty years).

31. <sup>31</sup>. See *United States v. Henderson*, 105 F.Supp.2d 523, n.13 (S.D. W. Va. 2000) (noting possible sentence reduction to one year under 21 U.S.C. § 841(b)(4) for defendants who distribute marijuana, but finding that section inapplicable to the case at bar as the indictment charged conspiracy to distribute both methamphetamine and marijuana); *United States v. Lowe*, 2000 WL 1768673 (S.D.W.Va. 2000) (conspiracy to distribute marijuana conviction under 21 U.S.C. § 864 subject to maximum one year penalty rather than 5 years requested by prosecutor, as jury did not find that marijuana was distributed for remuneration or that it was more than small amount).

32. <sup>32</sup>. See e.g., *United States v. McIntosh*, 2001 WL 21231 (8<sup>th</sup> Cir., Jan. 10, 2001) (upholding 20 year sentence, the mandatory minimum for drug offense resulting in death, in case where defendant pleaded guilty to 841 but leaving until sentencing determination of whether death resulted from D's acts, in case where defendants admitted quantity sufficient to carry maximum life sentence). See also *Edwards v. United States*, 118 S.Ct. 1475, 1477 (1999) (enhanced sentence under the relevant conduct provision of the federal sentencing guidelines for crack did not exceed "the maximum that the statutes permit for a cocaine-only conspiracy").

33. <sup>33</sup> See, e.g., *United States v. Nguyen*, 2001 WL 115005 (9<sup>th</sup> Cir., Feb. 8, 2001) (even assuming *Apprendi* applies retroactively, there is no error because the sentence was within the maximum allowed for the unaggravated offense). In cases where the claim was not raised in a timely way, the same rationale applies to prevent a finding that the error affected substantial rights, or caused a miscarriage of justice. See e.g., *United States v. Heckard*, 2000 WL 15532 (10<sup>th</sup> Cir., Jan. 8, 2001) (finding no plain error because sentence was within the maximum allowed for the lesser offense which was properly

proven); *United States v. Whitt*, 2001 WL 114734 (7<sup>th</sup> Cir. 2001) (no plain error, within sentence maximum for unaggravated offense); *United States v. Smith*, 2000 WL 1144602 (4<sup>th</sup> Cir. 2000) (unpublished) (finding no plain error because the defendant received sentences that did not exceed the statutory maximums set out in 21 U.S.C. § 841(b)(1)(C)); *United States v. Garcia-Guizar*, 2000 WL 1346233, \*3 (9<sup>th</sup> Cir. 2000) (no plain error under *Johnson* in failing to submit amount of drugs to jury because sentence of 168 months well within the 20 year prescribed statutory maximum, and resentencing under Guidelines would result in same sentence); *United States v. Moore*, 2000 WL 1339497 (4<sup>th</sup> Cir. 2000) (same); *United States v. Wright*, 2000 WL 1283053 (4<sup>th</sup> Cir. 2000) (same).

34. <sup>34</sup>. 220 F.3d 926 (8<sup>th</sup> Cir. 2000) (the indictment charged, and the jury was instructed upon, the *type* of drug but not the quantity).

35. <sup>35</sup>. Defendant received a two-level enhancement for possession of a gun during his drug-dealing activity, and a one-level downward departure because he faced immediate deportation upon completion of his sentence. His offense level of 37, combined with his criminal history category of 2, allowed a sentencing range of 235 to 293 months' imprisonment.

36. <sup>36</sup> See Federal Sentencing Guidelines Manual § 2D1.1, p. 100 (West 1998-99).

37. <sup>37</sup> See *Watts v. United States*, 519 U.S. 148 (1997) (per curiam). The judge is also bound by the statutory minimum sentence for the amount of drugs that he determines during sentencing that the defendant possessed. Thus, the district judge was compelled to sentence Aguayo-Delgado to at least 240 months, despite the lower sentence of 235 months available under the Guidelines.

*Apprendi* did not overturn *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which permits a judge to impose a mandatory minimum sentence (with the statutory maximum) based upon a finding by a preponderance of the evidence. For a good discussion of why the mandates of the Sentencing Guidelines are not equivalent to statutory maxima under *Apprendi*, see *United States v. Kinter*, 235 F.3d 192 (4<sup>th</sup> Cir. 2000) (noting that "the Commission's act of establishing sentence ranges . . . is categorically different from the legislative act of setting a maximum penalty in a substantive criminal statute," citing *Mistretta*). Most Circuits agree, see *United State v. Brough*, 2001 WL 278479 (7<sup>th</sup> Cir. 2001); *United States v. Breen*, 2001 WL 258401 (2<sup>d</sup> Cir. 2001); *United States v. Robinson*, 241 F.3d 115 (1<sup>st</sup> Cir. 2001); *United States v. Wilson*, 2001 WL 303650 (10<sup>th</sup> Cir. 2001). The Sixth Circuit, however, has held that facts triggering mandatory minima do implicate *Apprendi*. See *United States v. Strayhorn*, \_\_\_ WL \_\_\_ (May 22, 2001 ) (defendant received ten-year sentence, remanding for resentencing when drug amount triggering 10 year mandatory minimum sentence not proven beyond a reasonable doubt, even though within the statutory maximum, noting "factors . . . that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence are now elements").

38. <sup>38</sup> *E.g.*, *United States v. Lahi*, 2001 10267 (10<sup>th</sup> Cir, Jan. 4, 2001) (upholding sentence for child sexual assault even though aggravating feature not in indictment, noting defendant was not sentenced for more than maximum allowed for unaggravated offense); *United States v. Baltas*, 236 F.3d F.3d 27 (1<sup>st</sup> Cir 1/20/01). For a different view, see *State v. Gould*, 2001 WL 557972 (Kan., May 25, 2001) (finding that fact triggering sentence above guideline range must be proven to jury beyond reasonable doubt, over dissenter who argued "defendant did not receive more than the guidelines authorized ...[s]he merely received more than the standard sentence because certain sentencing factors were present.").

39. <sup>39</sup>. 520 U.S. 461, 470 (1997).

40. <sup>40</sup>. See *United States v. Mietus*, 237 F.3d 866 (7th Cir. 2001) (concluding that the jury "must have found" the amount); *United States v. Perez-Montanez*, 202 F.3d 434 (1st Cir. 2000) (*Jones* error raised for the first time on appeal, noting that because the indictment specifically referred to the statutory section of the carjacking statute specifying the enhanced sentence if death results, the defendant's claim was limited to objecting to the failure to *instruct the jury* on those elements at trial, which, after review under plain error standards, produced neither prejudice nor miscarriage of justice, citing *Johnson*); *United States v. Wiggings*, 1999 U.S. App. LEXIS 30695 (4th Cir. 1999) (finding failure to charge trial jury about the sentence maximum enhancing fact (a shotgun) was not plain error, citing *Johnson* and noting that evidence defendant used a short-barrelled shotgun was "overwhelming" and "essentially uncontroverted"); *United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000) (*Castillo* error raised for first time on appeal, review under plain error standard failed to establish that omitted element "affected substantial rights" as there was overwhelming evidence that defendants used a semiautomatic assault weapon, and failed to establish any miscarriage of justice); *United States v. Jackson*, 236 F.3d 886 (7th Cir. 2001) (overwhelming evidence of more than 5 grams no plain error); *United States v. Nance*, 236 F.3d 820 (7th Cir. 2000) (same); *United States v. Poulack*, 236 F.3d 932 (8th Cir. 2001) (jury would have found drug amount, no plain error); *United States v. White*, 2001 WL 121081 (2d Cir. Feb. 13, 2001) (no plain error when defendant stipulated to type and amount of drugs at trial); *United States v. Candelario*, 2001 WL 94607 (11th Cir. Feb. 5, 2001) (no substantial rights affected); *United States v. Reed*, 2001 WL 91501 (10th Cir., Feb. 2, 2001) (not plain error, upholding plea-based conviction because jury would have found at least that amount, also noting that the defendant expressly waived his right to trial knowing the quantity charged and consenting to a determination of quantity at a judicial hearing); *United States v. Wims*, 245 F.3d 1269 (11th Cir. 2001) (imposition of forty-year sentence not plain error because uncontested proof suggested jury must have found 500 grams or more, allowing up to forty years);

41. See *United States v. Von Meshack*, 200 WL 1218437 (5th Cir. 2000) (two life sentences for conspiracy to possess crack cocaine with intent to distribute and possession of crack cocaine vacated for plain error where unenhanced maximum sentence would have been 30 years); *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000) (where indictment alleged 2308 marijuana plants, this amount was hotly contested at trial and sentencing, and the jury was instructed to find only "detectable amount," imposition of enhanced 10-year sentence rather than otherwise applicable five year sentence was "plain error" that affected "substantial rights" and seriously affected the fairness of the judicial proceeding); *United States v. Lewis*, 2000 WL 1390065 (4th Cir. 2000) (unpublished) (where indictment alleged conspiracy to distribute marijuana and cocaine, and general jury verdict did not specify which of the controlled substances was the object of the conspiracy, plain error affected substantial rights of the defendant and the fairness of the judicial proceeding, as defendant received 121 month sentence based upon cocaine when the statutory maximum for marijuana was five years); *United States v. Westmoreland*, 2001 WL 125878 (7th Cir. Feb. 15, 2001) (finding the omission of an element from jury instructions was indeed plain error, in case where the drug amount was closely contested and sentence exceeded maximum for lesser offense); *United States v. Yakle*, 2001 WL 25719 (8th Cir., Jan. 11, 2001) (remanding for resentencing noting that the amount was not determined by the jury nor alleged in the indictment, and the sentence exceeded the statutory amount for the lesser offense by almost two years); *United States v. Yakle*, 2001 WL 25719 (8th Cir., Jan. 11, 2001) (finding substantial rights affected and remanding sentence of 262 months because it exceeded 20-year maximum where amount not alleged in indictment,

nor submitted to the jury).

42. <sup>42</sup>. See, e.g., *United States v. Prentiss*, 206 F.3d 960, 966 (10th Cir. 2000) (vacating conviction where indictment failed to include an element of the crime charged, as such omission is a "fundamental jurisdictional defect that is not subject to harmless error analysis"); *United States v. Henderson*, 105 F.Supp.3d 523 (S.D. W.Va. 2000) (failure to allege specific drug amount in indictment limits punishment to the lowest statutory range provided by the statute, thus trial judge was limited to maximum 240-month sentence as provided in 21 U.S.C. § 841(b)(1)(C), rather than the maximum of life imprisonment provided by 21 U.S.C. § 841(b)(1)(A)); and 4 LaFave, Israel & King, *supra* note 22, at § 19.3(e) (discussing FRCrP 12(b)(2) and citing authority finding that omission of an element is always "plain error" to be noticed by the court *sua sponte*).

43. See, e.g., *United States v. Harper*, 246 F.3d 520 (6<sup>th</sup> Cir. 2001) (because defendant "stipulated to the amount of drugs for which he was held responsible . . . the principles articulated in *Apprendi* are not implicated by the instant case")

44. <sup>44</sup> See *United States v. Terry*, 240 F.3d 65 (1<sup>st</sup> Cir. 2001) (noting the failure to include amount of drugs in the indictment did not necessarily render the indictment unfair or make it an unreliable vehicle with which to commence proceedings).

45. <sup>45</sup>. See, e.g., *United States v. Duarte*, 246 F.3d 56 (1<sup>st</sup> Cir. 2001) (finding party's substantial rights not affected, and rejecting claim of plain error, because defendant had accepted responsibility for 1000 kilograms in plea agreement, and plea agreement set out maximum penalties faced and an acknowledgment that his admission exposed him to a life sentence); *United States v. Nance*, 2001 WL 1880629 (7<sup>th</sup> Cir., Feb. 29, 2001); *United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000) (denying relief for error of omitting type of weapon in indictment where error was harmless and not structural, citing *Johnson* and *Neder*); *United States v. Woodruff*, 1999 WL 776213 (9th Cir. 1999) (unpublished) (denying relief for error in omitting element from indictment when claim not raised until oral argument on appeal, noting no "miscarriage of justice" citing *Johnson*), *cert. denied*, 120 S.Ct. 2202 (2000); *United States v. Rios-Quintero*, 204 F.3d 214 (5th Cir. 2000) (rejecting claim that drug amount is an element under § 841, and stating that even if it was, it would not support a finding of plain error: noting that the indictment was "filed with a Notice of Enhancement that listed the relevant drug quantity," the defendant "stipulated that the offense involved more than one kilogram of heroin and that evidence was submitted to the jury," suggesting that it might decide differently if the indictment did not list quantity and the defendant contested the amount at trial); *United States v. Rebmann*, 226 F.3d 1278, n.1 (6th Cir. 2000) (finding that indictment is "probably technically deficient" because it did not include enhancement for fact of resulting death, but refusing to address the issue because it was not raised by the parties); *United States v. Swatzie*, 2000 WL 1421337 (11th Cir. 2000) (no plain error relief where government failed to allege quantity of cocaine in indictment, despite increase in statutory maximum sentence from 30 years to life imprisonment, because the government gave defendant notice of the enhancement a week after the indictment was filed).; *United States v. Poulack*, 236 F.3d 932 (8<sup>th</sup> Cir. 2001) (defendant stipulated at trial to drug quantity that exposed him to higher sentence). See also *United States v. Prentiss*, 206 F.3d 960, 978-79 (10th Cir. 2000) (Baldock, C.J., dissenting) ("a defendant's right to have a jury find each element of the charged offense beyond a reasonable doubt is no less important than a defendant's right to have each element of the same offense presented to the grand jury . . . illogically, denial of the former right is subject to harmless error analysis, but denial of the latter right is not").

46. <sup>46</sup>. See *United States v. Williams*, 504 U.S. 36 (1992) (exculpatory evidence need not be presented to the grand jury); *United States v. Mechanik*, 475 U.S. 66 (1986) (challenge to indictment based upon prosecutor misconduct was rendered moot by defendant's subsequent conviction at a fairly conducted trial); *Costello v. United States*, 350 U.S. 359 (1956) (insufficient or even non-existent proof before the grand jury is considered "cured" by a subsequent conviction by proof beyond a reasonable doubt).

Another, albeit more remote, possibility is that the Court will decide that the essential elements requirement is not mandated by the Grand Jury Clause of the Fifth Amendment. See 4 LaFave, Israel & King, *supra* note 22, at § 19.2(f) (arguing that even the most plausible functional defense of the essential elements requirement - that it is needed to insure grand jury screening - is questionable).

47. <sup>47</sup>. 386 U.S. 18 (1967).

48. <sup>48</sup>. 489 U.S. 288 (1989). See also *Bousely v. United States*, 523 U.S. 614 (1998) (considering the application of *Teague* in proceeding under § 2255).

49. <sup>49</sup>. See also King & Klein, *supra* note 4 (discussing *Apprendi* and prior precedent).

50. <sup>50</sup>. See *Lambrix v. Singletary*, 521 U.S. 151 (1997).

51. <sup>51</sup>. See *Graham v. Collins*, 506 U.S. 461, 477 (1993).

52. <sup>52</sup>. *Sawyer v. Smith*, 497 U.S. 227 (1990).

53. <sup>53</sup>. See *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

54. <sup>54</sup>. See 5 LaFave, Israel & King, 28.6 (d) and (e) (discussing *Teague* exceptions). See also *United States v. Smith*, 241 F.3d 546 (7<sup>th</sup> Cir., Feb. 8, 2001) (alternative holding: Supreme Court has not applied *Apprendi* retroactively); *Jones v. M.D.L. Smith*, 231 F.3d 1281, 1238 (9<sup>th</sup> Cir. 2001) (declining to apply *Apprendi* rule to initial collateral attack); *Talbott v. Indiana*, 225 F.3d 866, 869 (7<sup>th</sup> Cir. 2000) (warning prisoners to reconsider bringing initial collateral attacks based on *Apprendi*). But see *United States v. Murphy*, 109 F.Supp.2d 1059 (D.Minn. 2000) (holding that *Apprendi* error falls under second *Teague* exception and therefore is to be applied retroactively under § 2255); *United States v. Nicholson*, 231 F.3d 445 (8<sup>th</sup> Cir. 2000) (*Apprendi* may be retroactively applicable in a first section 2255 petition).

55. See *Tyler v. Cain*, No. 00-5961, 69 U.S. L. W. 3393 (Dec. 12, 2000) (discussing retroactivity of *Cage*, 498 U.S. 39 (1990)).

56. See *United States v. Sanders*, 2001 WL 369719 (4<sup>th</sup> Cir. April 13, 2001).

57. <sup>57</sup>. 523 U.S. 614 (1998) (*Bailey* claim under § 2255 not barred under *Teague*, because *Teague* bars only application of new rules of *procedure*, not interpretations of substantive law)

58. <sup>58</sup>. Cf. *United States v. Lanier*, 205 F.3d at 963 (*Teague* not applicable to claim of missing element under *Richardson v. United States*, 526 U.S. 813 (1999), a case interpreting the federal Continuing Criminal Enterprise offense to designate each "violation" of the "series" as a separate element, an interpretation adopted in part to avoid problems with constitutionality under *Schad v. Arizona*, 501 U.S. 624 (1991)); *Murr v. United States*, 200 F.3d 895, 906 (6<sup>th</sup> Cir. 2000) (same).

59. <sup>59</sup>. 28 U.S.C. § 2255. Certification is also available if the claim is based upon newly discovered

evidence, but *Apprendi* claims are typically apparent on the face of the record. *See In re Joshua*, 224 F.3d 1281 (11th Cir. 2000) (holding that even if *Apprendi* is a new rule of constitutional law, it was not made retroactive to cases on collateral review by the Supreme Court), *Talbott v. Indiana*, 226 F.3d 866 (7th Cir. 2000) (refusing to consider successive collateral attack on a sentence until the Supreme Court declares *Apprendi* retroactive under 28 U.S.C. §§ 2244(b)(2)(A), 2255 para.8(2)). *But see West v. Vaughn*, 204 F.3d 53, 59-63 (3d Cir. 2000) (holding that decision of the Supreme Court is "retroactive to cases on collateral review" if its logic implies retroactivity under the approach of *Teague*).

60. <sup>60</sup>. *See* discussion at notes \_\_\_\_\_, *supra*. *See United States v. Abdullah*, 2001 WL 118501 (8<sup>th</sup> Cir. Feb. 13, 2001) (successive motion barred because the Supreme Court has not made *Apprendi* retroactive); *Browning v. United States*, 241 F.3d 1262 (10<sup>th</sup> Cir. 2001) (*Apprendi* is not retroactive on second habeas petition). Similarly difficult barriers confront the federal prisoner seeking relief through § 2255 after the one year statute of limitations has passed. *See United States v. Wolff*, 2001 WL 194511 (8<sup>th</sup> Cir., Feb. 28, 2001).

61. <sup>61</sup>. *See Sustache-Rivera v. United States*, 221 F.3d 13 (1<sup>st</sup> Cir. 2000).

62. <sup>62</sup>. *Id.* (collecting such cases).

63. *See United States v. Jackson*, 129 F.S.2d 1053 (E.D. Mi. 2001).

64. *See Joseph v. United States*, 2001 U.S. Dist. LEXIS 6420 (S.D.Ala. 2001, May 11, 2001); *United States v. Hopwood*, 122 F. Supp. 2d 1077 (D. Ne. 2000).

65. <sup>65</sup>. *See Bousley v. United States*, 523 U.S. 614, 621-23 (1998) (Section 2255 relief from a plea-based conviction to the use of a firearm preceding Court's *Bailey* decision that use of a firearm requires active employment of the firearm requires a showing of cause and prejudice or innocence because defendant's *Bailey* claim was untimely, finding no cause for failure to raise objection to failure to charge element).

66. <sup>66</sup>. 523 U.S. at 522 -23, distinguishing *Reed v. Ross*, 468 U.S. 1 (1984).

67. <sup>67</sup>. 523 U.S. at 623. *See also Sustache-Rivera v. United States*, *supra* note \_\_\_\_.

68. <sup>68</sup>. *See United States v. Apker*, 174 F.3d 934 (8<sup>th</sup> Cir. 1999) (noting *Bousley* appears to have foreclosed a showing of cause and prejudice for claimants challenging their convictions based on subsequent interpretations of substantive criminal law, and must instead prove actual innocence); *United States v. Sanders*, 2001 WL 369719 (4<sup>th</sup> Cir. 2001) (finding no cause for procedural default in 2255 case, alternative holding).

69. <sup>69</sup> *United States v. Smith*, 241 F.3d 546 (7<sup>th</sup> Cir. Feb. 8, 2001) (finding no cause for failing to raise challenge on time). *See also United States v. Hernandez*, 137 F.Supp. 2d 919 (N.D. Oh. 2001) (no cause or prejudice for failure to raise *Apprendi* earlier, denying motion for relief under 2255).

70. <sup>70</sup>. *See United States v. Villarreal Torres*, 163 F.3d 909 (5<sup>th</sup> Cir. 1999) (holding defendant alleging *Bailey* error can only overcome his procedural default if he demonstrates that "in light of all the evidence . . . it is more likely than not that no reasonable juror would have convicted him"); *United States v. Garth*, 188 F.3d 99 (3<sup>d</sup> Cir. 1999) (remanding for a hearing at which defendant alleging *Bailey* error following plea-based conviction can establish his actual innocence); *United States v. Sanders*, 2001 WL 369719 (4<sup>th</sup> Cir. 2001) (alternative holding, finding no miscarriage of justice to sentence defendant

above maximum of offense charged because admitted drug amount at plea allocution).

71. <sup>71</sup>. *Latorre v. United States*, 193 F.3d 1035 (8th Cir. 1999) (holding in § 2255 challenge under *Bailey*, that "if, as part of the plea agreement, the government withdrew more serious charges, the defendant must demonstrate actual innocence of those charges as well"). Judges presently disagree on whether a "more serious" charge is measured by the statutory maximum, or by the recommended sentence under the sentencing guidelines. Compare the majority opinion in *United States v. Halter*, 2000 U.S. App. LEXIS 15527 (8th Cir. 2000) (joining Third Circuit in holding that actual punishment rather than statutory maximum is the relevant factor in comparing the seriousness of the charges), with the dissenting opinion in *Halter* (statutory maximum controls). Given the use of statutory maximum as the gauge for *Apprendi* error, as well as for entitlement to jury trial, we respectfully disagree with the *Halter* majority decision.

72. <sup>72</sup>. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984) (establishing two-part standard for evaluating claims of ineffective assistance of counsel -- defendant must show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (if a defendant challenges representation in connection with a guilty plea, he must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial").

73. <sup>73</sup>. *Strickland*, 466 U.S. at 687-88.

74. <sup>74</sup>. *See* note 10, *supra*. In the period between the announcement of the *Jones* and the Court's decision in *Apprendi*, however, the failure to raise this argument could arguably fall below professional standards.

75. Compare e.g., *People v. Clifton*, 2001 Ill. App. LEXIS 305 (April 24, 2001) (facts that allow imposition of consecutive sentences must be submitted to jury and proven beyond a reasonable doubt); *People v. Burns*, 2001 Ill. App. LEXIS 173 (March 29, 2001) (same) *with* *People v. Avery*, 2001 Ill. App. LEXIS 308 (April 26, 2001) ("Consecutive sentences do not increase the penalty beyond " statutory maximum, rejecting defendant's claim that facts allowing the imposition of consecutive sentences be decided by jury).

76. <sup>76</sup>. *See e.g., State v. Baker*, 8 P.3d 817 (Mont. 2000) (Leaphart, J., concurring) (finding that MCA § 45-5-502(3), which increases penalty for sexual assault from maximum of 6 months to maximum of 100 years based upon fact that victim was less than 16 years old and offender is three or more years older than victim, is an element of the offense, but affirming verdict and sentence on ground that substantial and credible evidence presented to the jury established the element); *Clark v. State*, 621 N.W.2d 576 (N.D. 2001) (failure to charge use of firearm separately was harmless given proof at trial); *People v. Rhodes*, 723 N.Y.S. 2d 2 (NY Sup. Ct. 2001) (no violation of right to have jury decide "display of weapon" enhancement when proof showed defendant fired gun); *Pearson v. State*, 2001 WL 220145 (Ala. Crim. App. March, 2, 2001) (harmless to find near-school enhancement of state drug sentence by preponderance because sentences within maximum for unenhanced crime, rendering error harmless); *State v. Montgomery*, 254 Conn. 694, 759 A.2d 995 (2000) (failure to submit firearm enhancement harmless); *State v. Price*, 61 Conn. App. 417 (Conn. App. 2001) (failure to submit firearm enhancement harmless given jury's findings); *State v. Velasco*, 253 Conn. 210, 751 A.2d 800, 814 (2000) (following *Neder*, vacating enhanced sentence for use of a firearm as evidence was neither uncontested nor overwhelming); *State v. Benavides*, 979 P.2d 234, 242 (N.M. App. 1998) (following *Johnson's* plain

error rules, but vacating perjury conviction because the defendant properly objected to the trial court's failure to submit materiality to the jury); *People v. Cleveland*, 2001 WL 192638 ( Cal. App., Feb 27, 2001) (no plain error, denying relief). *But see State v. Greene*, 623 A.2d 1342, 1345 (N.H. 1993) (reversing and remanding, when instructions omitted the requirement that the jury's finding that the defendant committed the predicate offense must be unanimous, because such an error "can never be harmless"); *Smith v. Hardrick*, 266 Ga. 54, 464 S.E.2d 198 (1995) (indictment that fails to either track statutory language or allege every element of the crime charged is fatally defective, even after guilty plea); *State v. Grossman*, 622 N.W.2d 394 (Minn. App. 2001) (reversing sentence of forty years under Section 609.108, remanding for imposition of unenhanced thirty-year sentence for sex offense, rejecting harmless error); *State v. Guice*, 541 S.E.2d 474 (N.C. App. 2000) (relief due to firearm enhancement); *State v. Gould*, 2001 WL 557972 (Kan. May 25, 2001) (in child abuse case, refusing to apply harmless error to statute "unconstitutional on its face"; dissenter argues "it is clear beyond a reasonable doubt that a rational jury would have found that a fiduciary relationship [between victim and defendant, an aggravating factor under K.S.A. 2000 Supp. 21-4716] existed"); *Flores v. State*, 2001 WL 549066 (Tex.App. May 23, 2001) (relief for error in instruction allowing jury to convict of negligent homicide without finding defendant caused death required relief; not considering harmless error).

77. <sup>77</sup>. *See, e.g., People v. Buchholz*, 74 Cal.Rptr.2d 38, 46 (Cal. App. 5 Dist. 1998) (limiting *Johnson* to federal cases, holding failure to instruct on element was reversible error per se despite defendant's failure to object). *See also People v. Duncan*, 610 N.W.2d 551 (Mich. 2000) (refusing to apply *Neder*'s harmless error analysis where judge failed to instruct regarding any elements of felony-firearm offense, though facts were included in murder allegation and jury verdict form included the offense); *Cooper v. People*, 973 P.2d 1234 (Colo. 1999) (failure to instruct jury on element of burglary was structural error); *People v. Mason*, 2001 WL 1875846 (Ill. App. Feb. 2\_, 2001) (challenges to a court's statutory authority to impose a particular sentence are not waived by failure to raise them in a post- sentencing motion); *People v. Armstrong*, 2000 WL 1901578 (Ill. App.Dec. 29, 2000) (constitutional challenge to a statute can be raised at any time, remanding for resentencing in case involving 30 year enhancement despite failure to raise issue in trial court).

78. <sup>78</sup>. *See, e.g., Parker v. Oklahoma*, 917 P.2d 980 (Ok.Cr.App. 1996) (holding that because constitution protects only notice, an information that alleges sufficient facts such that a person can prepare his defense does not violate due process, even where the information does not allege each element of the crime); *State v. Kjorsvik*, 812 P.2d 86, 92 (Wash. 1991) (*en banc*) (holding that charging document challenged for first time after verdict is to be more liberally construed in favor of validity, and defendant must show actual prejudice by establishing that he received no actual notice of the charges from either the charging document itself or from "other circumstances of the charging process").

79. <sup>79</sup>. *See, e.g., State v. Childs*, 724 N.E.2d 781, 786 (Ohio 2000) (affirming appellate court reversal of conviction, following plea of no contest, on count of conspiracy, on the grounds that "the state's failure to allege a specific, substantial, overt act committed in furtherance of the conspiracy . . . rendered the indictment invalid"); *Jefferson v. State*, 556 So.2d 1016, 1019 (Miss. 1989) (stating that "the failure of the indictment to charge a criminal offense or, more specifically, to charge an essential element of a criminal offense, is not waived" by a guilty plea); *Cook v. State*, 902 S.W. 2d 471, 480 (Tex. Crim. App. 1995) (declaring conviction void because the indictment failed to charge "a person," and thus "did not vest the trial court with jurisdiction"). However, in some states, the issue of omitting an element from the indictment must be raised prior to trial. *See, e.g., Sawyer v. State*, 938 S.W.3d 843, 845 (Ark. 1997)

(denying habeas corpus petition, in part on grounds that petitioner did not object to omission of element from indictment prior to trial).

80. <sup>80</sup>. See *Clark v. State*, 621 N.W. 2d 576 (N.D. 2001) (collecting authority debating whether *Apprendi* meets second exception to *Teague* rule, but refusing relief, noting that court is "hesitant to base retroactive application of *Apprendi* " on the state's post conviction statute); *Sanders v. States*, 2001 WL 1868424 (Ala. App., Feb. 22, 2000); *People v. Kizer*, 2000 WL 1875872 (Ill. App. Dec. 26, 2000) (collecting authority debating whether *Apprendi* meets second exception to *Teague* rule, holding not retroactive); Cf. *State v. Purnell*, 735 A.2d 513, 523 (N.J. 1999) (rejecting retroactive application of decision classifying materiality as element under the state's version of *Teague*, reasoning that if instructing the jury on materiality were fundamental enough to qualify for an exception to the rule against retroactive application of new rules, then *Neder* and *Johnson* would have been decided differently).

81. See *People v. Rush*, 2001 Ill. App. LEXIS 369 (May 16, 2001) (applying *Apprendi* retroactively on collateral review); *People v. Burns*, 2001 Ill. App. LEXIS 173 (March 29, 2001).

82. <sup>82</sup>. Those state prisoners who failed to raise the issue in state court will have to show cause for and prejudice from that failure, or actual innocence, as discussed in the text at notes 47- 52 *supra*.

83. <sup>83</sup>. 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III).

84. <sup>84</sup>. See *Williams v. Taylor*, 120 S.Ct. 1495, 1499, 1512 (2000) (interpreting § 2245(d)).

85. <sup>85</sup>. *Id.*

86. <sup>86</sup>. Cf. *State v. Atwood*, 16 S.W.3d 192, 196-97 (Tex. Ct. App. 2000) (because the State had not proven all elements necessary for a felony conviction, in particular the fact of prior convictions, the appellate court reduced the sentence from a felony to a misdemeanor); *State v. Tofoya*, 91 Haw. 261, 982 P.2d 890 (1999) (following *Jones* and remanding for resentencing to unenhanced penalty because element was not proven to jury). See also *State v. Shoats*, 2001 WL 267054 (N.J. Super March 20, 2001) (vacating plea based conviction and remanding for either jury determination of enhancement factor, or renegotiate another plea bargain, or accept conviction on lesser offense, or, if the defendant waives the right to jury determination of the enhancing fact, a bench determination of that fact beyond a reasonable doubt).

87. <sup>87</sup>. For example, distributing 400 grams or more of cocaine in Texas yields a possible 99 year sentence, whereas the statutory ceiling for distributing any amount of cocaine is only 2 years. Texas Health & Safety Code § 481.112 (West 2000). Outside of the drug area, sentencing reductions have been quite large. See, e.g., *State v. Grossman*, 622 N.W.2d 394 (Minn. App. 2000) (decrease sentence from 40 to 30 years because jury did not find that the crime was motivated by sexual impulse); *Grant v. Florida*, 2001 WL 261646 (Fla. App. 1 Dist.) (judicial finding of sexual contact will not allow 85 months sentence, as this is above the statutory maximum for the unenhanced crime); *People v. Nitz*, 2001337197 (Ill.App. 5 Dist. 2001) (life sentence for murder enhanced for exceptional brutality reduced to 60 years); *Clark v. State*, 621 N.W.2d 576 (N.D. 2001) (5-year consecutive enhancement for "especially dangerous" offender must go to the jury, sentence reduced from 15 to 10 years); *People v. Chanthaloath*, 743 N.E.2d 1043 (Ill. App. 2 Dist.) (extended term of 40 years for brutality and elderly and physically handicapped victim reduced to 30 years); *People v. Burns*, 2001 WL 304090 (Ill App. 1 Dist. 2001) (50 year sentence

enhanced for serious bodily injury reduced to 40 years); *State v. Guice*, 541 S.E.2d 474 (N.C. App.) (sentence of 116 months enhanced for use of firearm exceeded statutory maximum for kidnapping, reduced by 5 years); *State v. Shoats*, 2001 WL 267054 (N.J. Sup. A.D.) (application of No Early Release Act, requiring that defendant serve 85% of his sentence and be subjected to automatic 5 year probation after sentence served, cannot be imposed unless the jury finds beyond a reasonable doubt that the defendant used a weapon); *Dillard v. Roe*, 2001 WL 289969 (9th Cir. 2001) (10-year consecutive enhancement for a defendant who "personally used a firearm" was an element, sentence reduced from 35 to 25 years).